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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1418

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, BERT W. JOHNSON, County Manager, and ROY McLAREN, Chief of Police of Arlington County,

Petitioners,

v.

RUDOLPH A. RICHARDS, MARIO A. CARBONI, FRANK TOMEK, THOMAS BECK, BRAXTON H. TABB, JR., MICHELLE McKENZIE, ELMER P. BORKOWSKI, ERNEST G. WALLACE, JOSEPH F. BELFIORE, JR., CAROLYN BOLLING, HOWARD E. HURLEY, JR., JAMES MOTT, H.D. MORRIS, GEORGE A. RISCILI, and RAY ELBERT PARKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, BERT W. JOHNSON, County Manager, and ROY McLAREN, Chief of Police of Arlington County,

Petitioners,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, the governing body of Arlington County, Virginia, the County's chief administrative officer and its chief of police, ask that a writ of certiorari issue to review a judgment of the Supreme Court of Virginia invalidating one of the County's ordinances which classifies vehicles for purposes of parking for repugnance to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 217 Va. ___, 231 S.E.2d 231 and is appended to this petition, as Appendix A (pp. 1a-13a, *infra*). The letter opinion of the Circuit Court of Arlington County is not reported. It is appended to this petition as Appendix B (pp. 14a-22a, *infra*).

JURISDICTION

The judgment of the Supreme Court of Virginia (App. C, pp. 23a-24a, *infra*) was entered on January 14, 1977. This Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does a municipal ordinance restricting parking on the streets of residential neighborhoods by non-residents who have no purpose in the neighborhood except to use its streets for parking when those streets are crowded with parked cars violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 29.D of the Zoning Ordinance of Arlington County, Virginia, entitled "Restriction on Parking in Districts in Which Commercial and Industrial Uses Are Not Permitted." is set forth in Appendix D at pages 24a-28a, *infra*.

STATEMENT OF THE CASE

Arlington County, Virginia, is a small, densely populated community near the center of the metropolitan area of Washington, D.C. A county in name and in form, Arlington is otherwise like a suburban city, with approximately 157,000 residents living in its 25.75 square miles in 1975.

In Arlington, as in many other communities, there are residential neighborhoods that border or are very near intensely used commercial and industrial districts. Streets in these residential neighborhoods tend to be used heavily, for travel and even more for parking, by those who drive to and from their jobs in the nearby business districts. When the streets of such a neighborhood become overcrowded with cars parked by the commuters, that neighborhood has a special problem that is not shared by the average residential neighborhood. The cars parked in the usual residential neighborhood are parked there only because their drivers and passengers live or are visiting or have business in the neighborhood.

Arlington reacted to this special problem faced by some of its residential neighborhoods by adopting an amendment to its zoning ordinance authorizing the restriction of on-street parking in residential sections of the County where specified conditions of parking congestion obtain. The purposes of the amendatory ordinance were expressly stated in its preamble to be:

> "to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the conditional uses allowed in Special Districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive noise, and trash and refuse

caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County." (App. D, 25a.)

The County Manager is directed by the ordinance to determine the residential areas where on weekdays of any month more than 75 percent of the on-street parking capacity is used and at the same time more than 25 percent of such capacity is used by operators of vehicles whose destination is not the residential area itself but a commercial or industrial area. When the tests which establish these facts have been made, parking during weekday business hours is restricted to vehicles displaying permits and service and delivery vehicles. Permits are issued to residents of the neighborhood for their own cars licensed in the County, for cars or trucks of those doing business with them and, to a limited extent, for their visitors' cars. (App. D, 26a-27a).

The Arlington residential neighborhood where this parking permit ordinance was made effective is Aurora Highlands. That neighborhood is near U.S. Route 1, adjacent to a district of large office and commercial buildings called Crystal City. After the required survey, the County Manager designated a permit parking zone consisting of just a few streets in Aurora Highlands. The zone has 192 parking spaces along portions of three streets containing 101 residences in 81 buildings. On the occasion of the most thorough study, 188 of the 192 spaces were occupied, and the drivers and passengers of

156 of the parked vehicles were destined for Crystal City. All but two of the 81 residential buildings have driveways, but some of these had been added after the Crystal City-induced parking congestion began in the 1960's. (Va. Appendix, [1] pp. 371, 373, 383 and 385.)

An action challenging the constitutionality of the ordinance in its application in Aurora Highlands was brought by a group of commuters who worked in Crystal City, and most of them had been parking all day every working day on the residential streets of Aurora Highlands where the restriction was in effect. The commuters alleged that the ordinance, among other things, denied them the equal protection of the laws in violation of the Fourteenth Amendment. Their suit was brought in the Arlington County Circuit Court, which held a trial. Plaintiffs sought to show at the trial either that there were no such problems in Aurora Highlands as the ordinance was designed to counteract or that the problems were not caused by them and their fellow commuter parkers. (Va. Appendix, frequently throughout pp. 46-222.) Their evidence also went to the availability and cost of commercial parking near their jobs in Crystal City. (Va. Appendix, pp. 137-139.)

The County introduced evidence to demonstrate the rational basis for the legislative judgment that (1) problems of parking congestion caused by outsiders do exist in neighborhoods which have the amount of parking established as a prerequisite for the restrictions of the ordinance (as such problems are conceded to have existed in Aurora Highlands) and (2) that the resident parking permit plan is an appropriate way to deal with them.

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[1] Wherever the record in the Virginia Supreme Court is being referred to, it will be referred to as the Va. Appendix.

The County introduced the testimony of residents of the affected streets, land use planners, transportation planners, and experts on air quality. The evidence tended to show that, when streets became overcrowded with cars that are in the neighborhood only to park, there is more trash and refuse, more noise (especially in the early morning), more likelihood of conflicts between residents and parkers, more traffic and parking violations, more problems of street cleaning and trash collection, more difficulty for residents and their visitors getting in and out of driveways and finding places to park near their houses, a likelihood that residential streets may have to be rebuilt to the higher standards of streets in commercial areas, a threat to property values, a reduction in the desirability of the neighborhood as a place for residential and family values to be preserved and an aesthetic harm to the neighborhood. There was evidence that in Aurora Highlands these problems were reduced by a reduction in the number of cars from outside parked on the streets. (Va. Appendix, p. 347 for example.) Environmental and transportation experts expressed their opinions that an appropriate way to reduce air pollution is to reduce the number of vehicle miles travelled and a way to do this is to encourage the use of mass transit facilities and discourage the use of cars for commuting by restricting the supply of free parking near areas to which many persons commute. At the time of the trial a proposed Environmental Protection Agency order would have required the County to control parking, and the ordinance had been conditionally approved as a method of meeting the EPA requirement. (Va. Appendix, pp. 256-293 and Defendant's Exhibit #1, App. E.)

The County's position was that the ordinance had worked and would continue to achieve its goals. This was illustrated in part by the testimony of one of the residents of the affected streets, a service station

operator, who told about the problems caused by the excessive parking, the flood of trash and damage to vehicles caused by vehicles squeezing into tight spaces, saying at the time of trial:

> "You'd have to be down there constantly every day to see just what it was like. It was bumper to bumper. You could hardly get in and out of the driveways. The neighbors really seemed upset, to tell you the truth. There was a lot of tension in the neighborhood because of this. You know, the streets were a lot dirtier then." (Va. Appendix, pp. 340-41.)

When asked about the effect of the restriction, he said:

> "Well, miraculously they're clear. You don't have the congestion that you did. They're cleaner. It's quieter. You don't hear them coming in the morning like you did . . .
>
> "You don't see as many cigarette butts and the like on the streets. It's a lot cleaner, a lot quieter, and I notice that the neighbors seem to be all getting along better. This is kind of like somebody has released all the pressure." (Va. Appendix, p. 347.)

While reciting that it had "had the benefit of the testimony of transportation experts, planners, ecologists, a representative of the Environmental Protection Agency as well as others," the trial court made no findings on any of the points at issue except as to the adequacy of parking facilities at Crystal City. (App. B, p. 15a.) It concluded broadly that the evidence did not show that the classification made by the ordinance, which it described as the creation of two classes—"those who reside in the permit area, and those who do not"—bears any reasonable relationship to the stated objectives of the ordinance." which it termed "laud[able]." (App. B, p. 21a.) That bare conclusion, unsupported by any intermediate findings, led the court to find violations of the due

process clauses of state and federal constitutions and of the Equal Protection Clause of the Federal Constitution. It enjoined enforcement of the ordinance. (App. B. p. 22a.)

On the County's appeal, the Virginia Supreme Court disregarded the evidentiary record and treated the question posed as one of law, that is to say as a question of facial validity. (App. A, p. 5a.) Its conclusion was that the objectives set forth in the statement of purpose of the ordinance clearly "constitute a legitimate governmental interest:" (App. A, 7a), but that in no circumstances could an ordinance that created a class consisting of residents and personal and business visitors to their neighborhood on the one hand, and a class of non-residents on the other be a valid means of furthering that legitimate interest because the classification does not bear the required "reasonable relation to those objectives" (App. A, p. 12a.) The court, so concluding, found it unnecessary to consider "arguments concerning 'special' legislation proscribed by . . . the *Va. Const.*, or those related to the due process and provileges and immunities clauses of the Constitution of the United States for [it] was of [the] opinion that this ordinance offends the equal protection clause of the 14th Amendment." and again that "the ordinance on its face offends the equal protection guarantee of the 14th Amendment." (App. A, pp. 5a-6a & 12a.) On that basis it affirmed the trial court's judgment.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the entire body of law that has grown up around this Court's application of the Equal Protection clause to economic and social legislation. It is important that the decision of the Virginia Supreme Court be reviewed (and reversed) because residents' parking permit ordinances generally

similar to Arlington's have been enacted or are being considered in many communities. Debate as to the wisdom (or the legality, under state law) of such ordinances should not be clouded by any question of their conformity with the United States Constitution when there is no such question.

1. To say that this Court has not decided the question which was decided below would be to show contempt for the process by which lawyers reason from the particulars of decided cases to general principles and then back to the particulars of a new case. The particulars of the Arlington County permit parking ordinance do not differ in their legal significance from the particulars of dozens of cases in which this Court has sustained economic or social legislation against challenges based on the Equal Protection Clause.

This does not mean that the Virginia Supreme Court did not cite the usual language of interpretation, because it said:

> "The 14th Amendment does not forbid classification in legislative enactments. Rather, it commands that classification be reasonably structured to serve a proper governmental interest. Classifications based upon race, national origin, and alienage are suspect and subject to strict judicial scrutiny and survive equal protection attacks only when designed to achieve an 'important', 'overriding', or 'compelling' governmental interest. [Citation omitted.] When the basis is not suspect, the classification is constitutionally permissible if the governmental objective is 'legitimate' and the classification bears a 'reasonable' or 'substantial' relation thereto.
>
> * * *
>
> "Classifications in municipal ordinances enjoy a presumption of validity, but that presumption may be 'overcome by unreasonableness apparent on the

face of the ordinance'. [Citation omitted.] Clearly the objectives stated here constitute a legitimate governmental interest." (App. A, pp. 6a-7a.)

The court even said that the method chosen to deal with the problem "may relieve the problem", but then made an ill-considered omission in the reasoning process and jumped to the conclusion that the classification amounted to invidious discrimination. This resulted in a failure to apply the principles of interpretation which it had quoted. If the Equal Protection Clause is to be applied this way in every case where it is in issue before the Virginia Supreme Court, then every new legislative classification in Virginia can be classified as invidious or not at the discretion of the state court and Virginians will be told that their legislative enactments violate the Federal Constitution on a different basis than has been established by this Court.

The long standing acceptance by this Court of regulations which try to create or preserve sanctuaries for residences when those regulations have been attacked as denying Equal Protection is the most obvious starting point for a lawyer who must determine the general principles which apply in this case. This is because the goals of the Arlington County ordinance are the same goals as have been approved in cases like *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L. Ed. 303 (1926) which approved the exclusion of industries and apartments from residential areas to keep them free of "disturbing noises," "increased traffic", and the hazards of "moving and parked automobiles" as well as to provide "children [with] the privilege of quiet and open spaces for play, *enjoyed by those in more favored localities.*" *Id.* at 394, 47 S.Ct. at 120-21. (Emphasis added.) *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) was not a zoning case, but it recognized

that the police power included "the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully protected." *Id.* at 33, 75 S.Ct. at 102-03. The importance of this power has been more recently affirmed by the upholding of an ordinance restricting the number of unrelated persons who might live in a single family home because such ordinances by restricting, among other conditions, the number of cars which pass through a neighborhood and park there, create a "sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974) A fair-minded observer ought to be able to reason that if a distinction between persons who are related by blood or marriage and those who are not can be made without invidiously discriminating, then a distinction between persons who are parking on streets to go to the residences abutting on those streets and persons who are merely using those streets as parking lots and proceeding to non-residential land use activities is equally free from invidious discrimination.

The Court's recognition that "a reasonable margin to insure effective enforcement, will not put on a law, otherwise valid, the stamp of invalidity" stated in *Euclid v. Ambler, supra* at 388, 47 S.Ct. at 118, was also reaffirmed by *Village of Belle Terre v. Boraas, supra.* This principle should give reader of the case additional confidence that a legislative body may make classifications in light of practical realities. Then too, Mr. Justice Powell's concurring opinion in *Young v. American Mini Theatres, Inc.* 427 U.S. 50, 96 S.Ct. 2440 (1976) (quoting with approval Mr. Justice Marshall's dissent in *Village of Belle Terre, supra*) makes it clear that the Court will not find that debatable or controversial classifications are prohibited by the Equal Protection Clause when those classifications have been created to protect the quality of life in residential areas and do

not have any basis in such categories as race, indigency or alienage:

> "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching Constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' *Village of Belle Terre v. Boraas,* [Citation omitted.] (Marshall. J. dissenting)." *Young v. American Mini Theatres Inc. supra* at 80, 96 S.Ct. 2440, 2457 (Powell, J. concurring).

Just last term, the Court considered the particulars of another case which helps to determine how the Equal Protection Clause is being applied, and reaffirmed the guiding principle of deference to legislative judgment in drawing lines separating one class from another. In *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S. Ct. 2513, 2516-17 (1976), the Court said:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

The holding of the case is as significant as the foregoing statement of the governing principle. The Court sustained a New Orleans ordinance that, by a grandfather clause, gave two long-time pushcart operators a monopoly of the pushcart business in the French Quarter. In doing so, the Court overruled *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 485 (1957), the only case in decades in which the Court has held that ordinary state or local legislation dealing with business affairs denied someone the Equal Protection of the laws.

If it is objected that the Arlington parking ordinance is not "local economic regulation" but something else, it ought to be enough to refer again to *Village of Belle Terre v. Boraas, supra,* where the issue was the validity under the Equal Protection Clause of an ordinance that limited the number of unrelated persons who could live together in a single family house. In deciding that there was no denial of Equal Protection, the Court included "social legislation" with the economic legislation that is the more usual subject of Equal Protection challenges which fail. It said that in the case of "economic and social legislation . . . legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective.' " *Id.* at 8, 94 S.Ct. at 1540. The purpose of the *Belle Terre* ordinance was similar to that of the Arlington ordinance, to preserve the quality of residential life by protecting, "[a] quiet place, where yards are wide, people are few, and motor vehicles restricted." *Id.* at 9, 94 S.Ct. at 1541. *Young v. American Mini Theatres, Inc. supra,* also sustained, against First Amendment and Equal Protection challenges, an ordinance that drew a line between so-called adult motion picture theaters and others and restricted where the

former could be operated. The prevailing opinion there did not treat the ordinance as economic regulation but said that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect" and that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71, 96 S.Ct. at 2440. Neither the prevailing opinion nor the concurring opinion treat this as any different from economic regulation. In addition, the economic regulation in *City of New Orleans v. Dukes, supra,* is all but indistinguishable from regulations promoting the quality of life because it was presumed by the Court to reach its economic goal by enhancing the tourist-oriented charm of the French-Quarter of New Orleans *Id.* at 299, 96 S.Ct. at 2516.

The cases that stand for and apply the general standard of deference to rational legislative judgments about where to draw the line in regulating such matters as businesses, professions, living arrangements, buildings and motor vehicle traffic are numerous. See *Ferguson v. Skrupa,* 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed.2d 93 (1963), *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488-490, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955); *Gorieb v. Fox,* 274 U.S. 603, 607, 47 S.Ct. 675, 676 (192).

The motor vehicle is a frequent object of such remedial legislation. "The use of the automobile as an instrument of transportation is peculiarly the subject of regulation." *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929). The Court has been deferential to legislative judgments embodied in such regulation. In *Railway Express Agency v. New York,* 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949), a New York City ordinance prohibiting the operation of vehicles carrying advertising other than of the vehicle operator's own wares was upheld on the theory that it was a traffic safety

measure. In rejecting an Equal Protection challenge, the Court accepted New York's traffic-safety justification of its ordinance and a further assumption that a rational legislative judgment might have been made that general advertising on a delivery truck was more distracting to other motorists and pedestrians and therefore more of a traffic hazard than advertisements of one's own wares.

The Arlington ordinance deals in a realistic, not fanciful, way with an admittedly serious problem, and it does not leave its purpose to conjecture. The problem is a particular aspect of the general problem of motor vehicle traffic congestion. The evils that result from allowing residential neighborhoods to be burdened with commuter parking are set out in the ordinance. The Virginia Supreme Court concluded, as it must, that eliminating these evils was a legitimate governmental objective. (App. A, p. 7a.) It is self-evident that prohibiting commuter parking is rationally calculated to achieve that objective. Arlington proved at trial the rational relationship of the means to the end, though the point scarcely needed proof, and it proved also that the ordinance had worked, though such proof is by no means essential to the validity of the ordinance. As for the commuters' evidence at trial, even if they showed that the ordinance had been a failure, that it was wholly unnecessary—which they did not—such a showing would be relevant, as this Court indicated just the other day, only if *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), were still good law. In *Whalen v. Roe,* ___U.S. ___, ___, 97 S.Ct. 869, 875, (1977) the Court said that, contrary to the holding of *Lochner,* "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."

The court below saw only a general parking problem as the object of concern in the Arlington ordinance. It said:

> "Local governments have a legitimate interest in regulating the cause of the manifold problems which result from parking congestion. But the cause of such problems is the use of public streets by motorists in general, wherever they live or work. A regulation which treats the cause by favoring the motorists who happen to reside along a public street at the expense of those who live elsewhere may relieve the problems, but solutions achieved at the price of invidious discrimination are too dear." (App. A, 11a-12a.)

This view of the problem has led the Virginia Court to ignore the permissibility of a step-by-step approach. If the Arlington ordinance is seen as one which attacks the general problem of parking congestion, it would not be a Constitutional objection that it deals with only one class of parkers. *Williamson v. Lee Optical of Oklahoma, supra* at 489, 75 S.Ct. at 465. The legislature could conclude that the phase of the problem of parking congestion it wished to attack first was the particular problem of congestion found only where residential neighborhoods have been overcrowded with parked cars from outside the neighborhood. If the problem is not seen as the general problem of parking congestion, then it is not necessary here to invoke such cases as these sustaining the Constitutionality of dealing with one cause of a problem at a time. The problem sought to be resolved by the Arlington ordinance can be seen as a problem special to residential neighborhoods affected by commuter parking. The Arlington ordinance does not need to be read as one concerned with congestion generally or with all kinds of congestion. Rational legislative responses to the multiple problems of traffic and parking congestion will of course vary with areas and circumstances. In business districts,

for example, limited-time parking enforced by parking meters, along with bus zones, taxi zones and loading zones may be the appropriate response.

When a residential neighborhood is subject to being crowded by cars from outside, there are, broadly, only three choices for the responsible governing body; (1) to leave parking unrestricted with the risk that the quality of the neighborhood residents' life will be degraded; (2) to restrict all parking and by doing so put a new burden on those using the residential area itself—a burden the ordinary residential area does not have and a burden that could destroy neighborhoods whose residences have no driveways or garages; or (3) to restrict parking and except from the restriction vehicles that are parked on the streets in connection with the use of property abutting on the streets where the restriction is in effect.

There is no guidance given by any reported case which shows how the third solution works an "invidious discrimination." The commuter has no right to park all day every business day in any residential district. Those excepted from the restriction are those who most need to use residential streets for parking, just as taxis, buses and trucks need to use taxi zones, bus stops, and loading zones—or just as those who have a special need to park on the streets around the Capitol and the building that houses this Court, may park there by permit to the exclusion of others. For most of us, free parking on a street convenient to our jobs is not seen as a right and rarely reaches the level of a reasonable expectation. Such a "right" cannot be seriously compared with the "fundamental personal rights" mentioned in *City of New Orleans v. Dukes, supra* or the First Amendment rights of speech and association raised by the litigants in *Young* and *Belle Terre*. Just as state statutes may permit highway billboards to advertise businesses located in the

neighborhood but not elsewhere,[2] so also there is nothing inherently "invidious'. in a classification that permits parking on the streets of a neighborhood when the person parking is using that neighborhood but forbids parking on the streets of a neighborhood when the destination of the person parking is elsewhere. It is not remotely like "suspect classifications such as race, religion, or alienage." that the Court recognized in *Dukes* may call for stricter than usual equal protection scrutiny.

2. Many communities throughout the country have acted or are considering acting as Arlington has to protect some of their residents from the threats to their health, safety, comfort, convenience and dignity that are posed by having cars jammed into the parking places in front of their houses all day every working day. Counsel for petitioners know of similar ordinances in Boston and Cambridge, Massachusetts; Wilmington, Delaware; San Francisco, California; Montgomery County, Maryland; Richmond and Charlottesville, Virginia; and the District of Columbia. The Cambridge and District of Columbia ordinances are the subject of judicial challenges comparable to the Crystal City commuters' complaint in this case. The Cambridge case is pending on appeal to the Supreme

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[2] *Markham Advertising Co. v. State*, 71 Wash. 2d 405, 439 P.2d 248 (1968) appeal dismissed for want of a substantial federal question 393 U.S. 316, 89 S.Ct.553, 21 L.Ed.512 (1969), where the Washington court said:

> "A factual distinction exists between signs advertising activities conducted on the premises and signs advertising activities being conducted off-premises, because on-premises signs are part of the on-premises business not otherwise related to activities conducted on the land." *Id.* 439 P.2d at 256.

Young v. American Mini Theatres, Inc. supra at 68, 96 S.Ct. at 2440 cites *Markham* as authority for its acceptance of the classification distinguishing advertising of businesses in the neighborhood of the sign and those elsewhere.

Judicial Court of Massachusetts from a decision upholding the ordinance. *Fishman v. Massachusetts*, No. 729. In the District of Columbia litigation, a judge of the Superior Court has issued a preliminary injunction against residents' permit parking in Georgetown and surrounding neighborhoods. *Georgetown Ass'n of Businessmen v. District of Columbia*, Civ. Action Nos. 7242-76 et al. In the only other reported decision of which we are aware, a common pleas court in Ohio invalidated a residential parking ordinance with some points which are comparable to Arlington's. *State v. Whisman*, 24 Ohio Misc. 59, 263 N.E.2d 411 (1970). Other kinds of parking classifications have been upheld, although the Virginia Supreme Court did not find helpful the cases of *Akron v. Davies*, 111 Ohio App. 103, 170 N.E.2d 494 (1959), which upheld a prohibition on on-street parking around public buildings by all except publicly owned vehicles; *Commonwealth v. Sargent*, 330 Mass. 690, 117 N.E.2d 154 (1953), which upheld an on-street parking prohibition in the area of the State Capitol for all except members of the state legislature; *Town of Leesburg v. Tavenner*, 196 Va. 80, 82 S.E.2d 597 (1954), which upheld a prohibition of on-street parking for all except common carriers and commercial vehicles; and *Funeral Directors Ass'n v. Groth*, 202 Va. 792, 120 S.E.2d 467 (1961), which upheld a prohibition of on-street parking during funerals for all but those participating in the funerals. The classifications of these cases were distinguished because "in none was the classification based upon residence". (This is the kind of specious differentiation which is very disappointing to persons trying to interpret the Equal Protection Clause. There is no principle of interpretation which says "residence'. is a forbidden basis of classification.[3]) In each of the

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[3] In some cases concerning residence the decisions are very much to the contrary. For example, a requirement that city

[footnote continued]

foregoing cases, unlike the instant case, people other than government workers, legislators, funeral attendees, commercial vehicle operators and common carriers who also wished to park in the area because of the "activities conducted on the land" adjoining the streets on which they wished to park were prohibited from parking. Thus, the classification of the instant case is more inclusive than those of the cases distinguished by the lower court, because in the Arlington case all who use the residential area are permitted to park there.

A number of the current ordinances are like Arlington's in that they have been adopted or are being considered to some degree in response to Environmental Protection Agency plans to improve air quality by controlling automobile traffic. On review of such a plan for Metropolitan Boston, the Court of Appeals for the First Circuit considered a part of the plan that would ban on-street parking and restrict off-street parking during the morning commuting hours in the Boston core area. Quite to the contrary of the state courts of the District of Columbia, Ohio and Virginia, this federal court said that it approved the plan only on EPA's representation that residential parking spaces and certain other spaces were exempt from the on-street parking ban. In addition, the court said that off-street facilities could be separated between residential and commercial parkers so that the former could remain parked during the restricted hours. *South Terminal Corp. v. EPA*, 504 F.2d 646, 671-72 (1st Cir. 1974). Surely this federal court is correct in its judgment that a parking preference for residents is not

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employees and police officers maintain residences in the locality of their employment was upheld against an argument that it denied Equal Protection *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97 (Mich. 1971) appeal dismissed for want of a substantial federal question 92 S.Ct. 1173.

only appropriate but may be necessary to make a parking restriction program reasonable, and the state court judges are wrong in believing that the United States Constitution prevents a local governing body from putting such a preference in a parking control plan.

CONCLUSION

The Arlington ordinance is a practical and down-to-earth solution to a hard problem, and it is easy to argue not only that it is a permissible classification, but that it is a wise one. The petition should be granted. As noted above, the Virginia Supreme Court treated the question before it as one of law to which the record made in the Circuit Court was irrelevant. We agree that the case may be decided based on the conceivable basis for the legislative action (although the case for the ordinance is given additional weight by the evidence actually presented at trial). Because there is one or more than one conceivable basis on which to uphold the ordinance without considering the evidence introduced at trial, this Court does not need to refer to any substantial record in

deciding the case. The authorities are familiar to the Court. In the circumstances we suggest to the Court that the appropriate disposition of the case may be summary reversal of the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A

COUNTY BOARD OF ARLINGTON COUNTY et al.

v.

Rudolph A. RICHARDS et al.

Record No. 760056.

Supreme Court of Virginia.

Jan. 14, 1977.

Charles G. Flinn, Deputy County Atty. (Jerry K. Emrich, County Atty., on briefs), for appellants.

Herbert C. Harper, Fairfax (Ray Elbert Parker, pro se, on brief), for appellees.

Arlington Chamber of Commerce (Charles McDonnell Radigan, Barham, Radigan, Suiters & Brown, Arlington, on brief), amicus curiae, for appellants.

Before CARRICO, HARRISON, COCHRAN, HARMAN, POFF and COMPTON, JJ.

POFF, Justice.

Appellants[1] challenge the trial court's judgment declaring a county ordinance authorizing permit parking on certain public streets unconstitutional as applied to appellees.[2]

On May 18, 1974, County Board of Arlington County amended and reenacted § 29 D of its zoning ordinance. The preamble stated the legislative purpose to be:

> . . . to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the Conditional Uses allowed in Special Districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive

1. County Board of Arlington County, Bert W. Johnson, County Manager of Arlington County, and Roy McLaren, Chief of Police of Arlington County.

2. Rudolph A. Richards, Mario A. Carboni, Frank Tomek, Thomas Beck, Braxton H. Tabb, Jr., Michelle McKenzie, Elmer P. Borkowski, Ernest G. Wallace, Joseph F. Belfiore, Jr., Carolyn Bolling, Howard E. Hurley, Jr., James Mott, H. D. Morris, George A. Riscili and Ray Elbert Parker.

> noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County."

The county manager was empowered to implement § 29 D (hereinafter, the ordinance) in those residential areas in which he determined that "on the weekdays of any month" 75% of street parking capacity was filled and more than 25% of capacity was being occupied by "operators of vehicles . . . using districts in which commercial or industrial uses are permitted". In such residential areas, parking privileges were restricted to "service or delivery vehicles" and vehicles displaying permits. Parking permits were to be issued to "persons who are residents" of a restricted zone for "every vehicle owned by those persons and registered in the County"; "persons who are visitors of any residents"; and

"persons who do business with any residents". Parking violations were declared unlawful.

Aurora Highlands, a residential community consisting largely of single-family homes, is located along State Route 1 opposite "Crystal City", a complex of high rise office and commercial buildings where 20,000 workers are employed. Based upon an engineering study, the county manager designated a portion of Aurora Highlands as a permit parking zone. The zone embraced 81 buildings containing 101 residences and 192 parking spaces along portions of three streets. All but two of the single-family homes had off-street parking facilities.

Appellees were employed in Crystal City. Most commuted to work by automobile and parked on streets in Aurora Highlands. When the permit zone was established, they filed two motions against appellants seeking a declaratory judgment that the ordinance, as applied to them, denied them due process of law and equal protection of the laws, and praying for an injunction against its enforcement. The two motions were consolidated for trial, and the trial court, sitting without a jury, heard evidence *ore tenus*.

By final order entered September 16, 1975, incorporating a letter opinion dated

June 18, 1975, the trial court found that the classification bears no "reasonable relationship to the stated objectives", ruled that "the classification . . . is arbitrary and unreasonable", and declared that "the application of the ordinance to the petitioners is found to be violative" of their rights to due process and equal protection of the laws. The trial court decreed that appellants be "enjoined permanently from enforcing the provisions of . . . [the ordinance] against the petitioners".[3]

On brief, appellants posed the question: "Is the ordinance as it is applied to the appellees who are denied permits, a denial of due process . . . or . . . equal protection . . . ?" At bar, however, both parties agreed that the effect of the final order was to declare the classification arbitrary and the ordinance unconstitutional on its face, and we will consider the question in that posture.

We find it unnecessary to address arguments concerning "special" legislation proscribed by Article IV, § 14 of the Va.Const.,

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3. In the court below, the Board of Supervisors of Prince William County filed a brief *amicus curiae* in support of appellees but did not appear on appeal. Arlington Chamber of Commerce moved this Court for leave to file a brief *amicus curiae* in support of appellants, and we granted the motion.

or those related to the due process and privileges and immunities clauses of the Constitution of the United States, for we are of opinion that this ordinance offends the equal protection clause of the 14th Amendment.

[1–3] The 14th Amendment does not forbid classification in legislative enactments. Rather, it commands that classification be reasonably structured to serve a proper governmental interest. Classifications based upon race, national origin, and alienage are suspect and subject to strict judicial scrutiny, and survive equal protection attacks only when designed to achieve an "important", "overriding", or "compelling" governmental interest. *Sandiford v. Commonwealth*, 217 Va. 117, 225 S.E.2d 409 (1976). When the basis is not suspect, the classification is constitutionally permissible if the governmental objective is "legitimate" and the classification bears a "reasonable" or "substantial" relation thereto. This is true even when the basis of the classification involves First Amendment guarantees. *Young, Mayor of Detroit v. American Mini Theatres, Inc.*, — U.S. —, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *see also McWhorter v. Commonwealth*, 191 Va. 857, 63 S.E.2d 20 (1951).

The ordinance creates two classes, and we must first decide what they are. Appellants say they are two classes of vehicles. Some appellees view them as a government-employee class and a non-government-employee class. One appellee treats them on brief as a property-owner class and a non-property-owner class. In our view, the ordinance creates one class consisting of residents of a defined zone who own automobiles registered in the county and persons who are visitors of or do business with such residents, and another class consisting of all other persons.

[4, 5] Hence, it appears from the face of the ordinance that the crucial basis of the classification is residence in a selected area. Classifications in municipal ordinances enjoy a presumption of validity, but that presumption may be "overcome by unreasonableness apparent on the face of the ordinance". *Kisley v. City of Falls Church*, 212 Va. 693, 697, 187 S.E.2d 168, 171 (1972). Clearly, the objectives stated here constitute a legitimate governmental interest. The question, then, is whether the classification bears a reasonable relation to those objectives.

Defending the ordinance, appellants cite two Virginia cases and several cases in other jurisdictions upholding ordinances regulating parking on public streets. *Town of Leesburg v. Tavenner*, 196 Va. 80, 82 S.E.2d

597 (1954) (parking zone restricted to all but common carriers and commercial vehicles); *Funeral Directors' Ass'n v. Groth*, 202 Va. 792, 120 S.E.2d 467 (1961) (parking forbidden during funerals); *Akron v. Davies*, 111 Ohio App. 103, 170 N.E.2d 494 (1959) (street parking around public buildings limited to public vehicles); *Commonwealth v. Sargent*, 330 Mass. 690, 117 N.E.2d 154 (1953) (parking by legislators permitted in no-parking zones).

We do not find the Virginia cases controlling or the other cases helpful. In each, the classification was sustained, but in none was the classification based upon residence. Nor is the decision in *State v. Rush*, 324 A.2d 748 (Me.1974) relevant to our determination of the validity of the classification here, for there the ordinance prohibiting overnight parking treated motorists as a single class.

[6] In response to appellees' argument that the objectives of the ordinance could be better achieved by other parking regulations applied to motorists as a single class, appellants say that they are not required to select the optimum solution to a public problem. It is true that a legislative body is not required to choose "the least restrictive alternative" except when "state action impinges on the exercise of fundamental

constitutional rights or liberties", *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51, 93 S.Ct. 1278, 1306, 36 L.Ed.2d 16 (1973), but it is never free to adopt an alternative so restrictive that it violates rights secured by the equal protection clause.

[7] Appellants rely, in part, upon general authority delegated to local governments under the zoning statutes. They argue that "many of the goals of Article 8, Chapter 11 of Title 15.1 are more effectively promoted by the parking regulation than by some other use regulation." Whatever authority local governments may derive from the zoning statutes to protect the distinctive characteristics of residential neighborhoods, such authority does not include the power to adopt ordinances which grant residents a parking monopoly in the public streets of their neighborhood.

[8–10] An owner of property abutting a public street has the right of ingress and egress and "the right to use the street as one of the public". *Nusbaum v. Norfolk*, 151 Va. 801, 805, 145 S.E. 257, 259 (1928). But ownership of such property gives the owner no right to the use of the street superior to that enjoyed by the public at large.

> "The right to park in a public street is not a right incident to the ownership of

> abutting land but rather one which is incident to the use of the street for travel and which is shared by the property owner in common with all other members of the traveling public." *Brown v. Jackson*, 268 Or. 111, 113, 519 P.2d 87, 88 (1974).

Cf. Town of Leesburg v. Tavenner, supra, 196 Va. at 85, 82 S.E.2d at 600, where we held that "[t]he fact that specific zones are designated on a public street for the loading and unloading of passengers by common carriers does not render the ordinance unreasonable or discriminatory as to owners of property or private enterprises adjacent to such areas." *See also* 7 Am.Jur.2d *Automobiles and Highway Traffic* § 240 (1963).

Necessarily, the parking privileges of residents are no greater than those of property owners. Nor is a resident's privilege inferior to that of the public at large.[4] The classification at bar cannot, therefore, be sustained on the theory that it protects different rights or privileges of the classes it creates.

The court in *State v. Whisman*, 24 Ohio Misc. 59, 263 N.E.2d 411 (1970) considered

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4. In *Kaufman v. West*, 133 Wash. 192, 233 P. 321 (1925), the court invalidated as discriminatory an ordinance which prohibited owners, occupants, visitors, and employees of an apartment house from parking across the street adjacent to the building.

an equal protection challenge to a permit parking ordinance much like the one at bar. There, upon a finding that "an extreme parking problem exists for the residents of" two streets in New Boston, the ordinance provided that parking be prohibited within a designated zone except by permit. A city official was instructed to issue permits to "bona fide residents" of the zone "who own or operate a motor vehicle" and, on a space-available basis, to "residents of the City of New Boston". Delivery vehicles "loading and unloading" in the zone were exempt, and "limited permits" were authorized "for visitors to the homes" located in the zone. The ordinance fixed a fine for parking violations.

Unlike the classification before us, the classification in *Whisman* did not grant the parking privilege to residents of the restricted zone to the exclusion of other residents of New Boston. Yet, the court found that "it absolutely discriminates against all persons who are not residents of New Boston", that "no valid justification for the classification exists", and that the ordinance "merely grants a parking right to residents in contravention of the well established rights of the general public." *Id.*, 24 Ohio Misc. at 65, 263 N.E.2d at 415.

Local governments have a legitimate interest in regulating the cause of the mani-

fold problems which result from parking congestion. But the cause of such problems is the use of public streets by motorists in general, wherever they live or work. A regulation which treats the cause by favoring motorists who happen to reside along a public street at the expense of those who live elsewhere may relieve the problems, but solutions achieved at the price of invidious discrimination are too dear.

We agree with the trial court that the classification created by this ordinance bears no reasonable relation to its stated objectives, and we hold that the ordinance on its face offends the equal protection guarantee of the 14th Amendment.

We do not condemn all permit parking ordinances. The one at bar was not enacted under authority of Code § 46.1–252.01 (Repl.Vol.1974). That statute empowers local governing bodies "to provide for the issuance of permits for motor vehicles parking on public streets" and to set the "rates" and fix the "term[s]" of such permits. In setting permit "rates", local governments are authorized to "differentiate" between two classes of motor vehicles, *viz.*, "motor vehicles upon which a license fee is paid to the political subdivision issuing such permit and other motor vehicles." Significantly, the statute does not allow local governments to deny permits to nonresidents.

Code § 46.1–252.01 is not in issue here, and we express no opinion upon its validity or the validity of an ordinance enacted pursuant thereto. Our decision affects only parking permit ordinances, such as that here, which create classifications not reasonably related to legitimate governmental objectives.

Affirmed.

APPENDIX B

CIRCUIT COURT OF ARLINGTON COUNTY
VIRGINIA

June 18, 1975

Charles G. Flinn, Esquire
Assistant Commonwealth Attorney
Arlington County
Arlington, Virginia 22201

Herbert C. Harper, Esquire
4085 Chain Bridge Road
Fairfax, Virginia 22030

Ray Elbert Parker, Esquire
7702 Schelhorn Road
Alexandria, Virginia 22306

Re: Parker v. Wholey, In Chancery No. 24527
Richards v. County Board, In Chancery No. 24659

Gentlemen:

The County Board of Arlington County enacted Sec. 29-D of its zoning ordinance to deal with parking problems in certain residential areas. In doing this the governing body stated its objectives in the preamble to the ordinance. They are to reduce hazardous traffic conditions, to protect from pollution, excessive noise, and the throwing of trash and refuse from vehicles, to protect residents from unreasonable burdens in gaining access to their residences, to preserve the residential character of the district, to promote the maintenance of the streets in a clean and safe condition, to preserve property values, to preserve the safety of children, pedestrians and traffic safety and in general to promote the peace, good order, comfort, convenience and welfare of the inhabitants of the county. The ordinance then provides that parking may be restricted to the residents

of the residential area who hold parking permits when the County Manager, or his designee, has found that the conditions stated in Paragraph 1 of Sec. 29D have been found to exist. Briefly stated it requires a finding that twenty-five percent of the parking spaces in the residential area are being used by vehicles whose operators are then using a commercial or industrial area and that the total number of spaces used by any vehicles exceeds seventy-five percent of the parking spaces on such streets. A study was made and the condition which permits the ordinance to be utilized was found to exist.

In passing it should be noted that the residential area involved here is a part of the South Arlington community of Aurora Highlands. In this area there are 101 residences including a thirteen unit apartment and eighty eight duplexes or single family homes. There were 103 permits issued which came from applicants living in sixty-nine of the dwelling units. No requests were made for permits by the occupants of thirty-two of the dwelling units. Of the single-family dwelling units there was evidence that all but two of them have off-street parking.

The commercial area involved is Crystal City. Although not yet complete, there are over 20,000 persons who work there. Many of them use public transportation. Most of the petitioners in this case, however, arrive at their work at seven o'clock in the morning and come from places where the use of public transportation at that time is not feasible. There is some parking in the office buildings, but it is not adequate to meet the needs of those who work there and it is not designed or intended to be adequate. In the general area of Crystal City are also the National Airport, motels and commercial development, the Potomac Yards and the county dump.

The dispute between the commuters and the neighborhood residents had been of long standing and the subject of litigation in both the Federal and state courts.

The petitioners contend in this case that the ordinance is unconstitutional under both the state and Federal constitutions in that it abridges their privileges and immunities as citizens of the United States, denies them their liberty or property without the due process of law, and denies to them the equal protection of the laws.

The County contends that it may make such classifications as it pleases so long as they have some rational basis, unless the classifications are in the area of "strict scrutiny", *viz.*, race, voting rights, sex, residence, or economic status, where they then become "suspect". Further, the County says that the validity of its action does not depend upon a showing of the presence of some compelling governmental interest.

In reaching its decision, the Court will briefly review the principal cases cited by counsel in their briefs and in oral argument.

In the case of *Village of Belle Terre v. Boraas, 416 U.S. 1, 94, S.Ct. 536,* (1974) the Supreme Court of the United States upheld the validity of a zoning ordinance which defined the word "family" to exclude communes. In deciding the case the Court found no procedural disparity inflicted on some but not on others, and found that the case involved no "fundamental" right guaranteed by the constitution.

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears a 'rational relationship to a [permissible] state objective' ". p. 1540 of 94 S.Ct.

The Virginia case of *Thompson v. Smith,* 155 Va. 367, recognized the right of the citizen to travel on the public highways and to transport his property on them to be a common right entitled to constitutional protection.

> "The exercise of such a common right the city may, under its police power, regulate in the interest of the public safety and welfare; but it may not arbitrarily or unreasonably prohibit or restrict it, nor may it permit one to exercise it and refuse to permit another of like qualifications, under like conditions and circumstances, to exercise it." p. 378 of 155 Va.

The Virginia Supreme Court has defined the difference between special and general legislation and has upheld legislation which it found to be general, although it applied only to a numerically small class of persons, "provided the classification itself be a reasonable and not an arbitrary one, and the law be made to apply to all of the persons belonging to the class without distinction." *Farmer v. Christian,* 154 Va. 48, 53.

> "A law is 'special' in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places or things from those upon which, but for such separation, it would operate." *Farmer v. Christian,* supra, 54.

The Court in *Farmer* pointed out that a useful guide is to look to the underlying reason for the limitation.

> "It follows, therefore, that if a law bears on its face no evidence of an exclusive or discriminative purpose, it is *prima facie* valid. . . . 'The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special. . . . If the only limitation contained in a law is a legislative classification of its objects, it is a general law.' " *Farmer v. Christian, supra,* p. 55.

Although the Court in *Farmer* was dealing with the validity of legislation under the Virginia Constitution as general rather than special, the reasoning used by the Court is analogous to that employed by courts in

determining the reasonableness of classifications in the equal protection sense.

Richmond Funeral Directors v. Groth, 202 Va. 792, was a mandamus proceeding to compel the city's director of public safety to reinstate certain regulations which had previously been promulgated relating to the restricting of parking where funerals were being conducted.

> "It is fundamental that streets and highways belong to the public. Subject only to the limitation that constitutional rights must not be invaded, supreme control over the streets and highways is vested in the state, which, acting under its police power and through the legislature, may prescribe reasonable restrictions and regulations for their use.
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> * * *
>
> "This power of the state over the streets and highways may lawfully be delegated to local governing bodies, and when so delegated, may be exercised by such bodies to the full extent of the power conferred.
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> * * *
>
> "It is immaterial that property owners might be temporarily deprived of their privilege to park, or that those conducting and attending funerals might be benefitted. These effects are merely incidental to a valid exercise of police power by the municipality." *Richmond Funeral Directors v. Groth, supra*, pp. 795, 796.

Although the validity of the regulations was not before the Supreme Court in the *Funeral Directors* case, it pointed to an earlier holding in a case where it had dealt with the validity of a parking ordinance, *viz.*, *Town of Leesburg v. Tavenner*, 196 Va. 80. In *Tavenner* the Court sustained an ordinance which prohibited all parking within a certain distance of an intersection. The ordinance permitted common carriers to take on or

discharge passengers there and other vehicles to load or unload freight or merchandise. The attack on the ordinance was made by an abutting landowner, who failed when it was held that his right was subordinate to that of the town's to so control the use of the streets as to promote the safety, comfort, health, and general welfare of the public. In sustaining the validity of the ordinance, the Court found that the classifications were natural, reasonable, and appropriate to the purposes sought to be accomplished. *Town of Leesburg v. Tavenner, supra*, at p. 84.

> "The ordinance is not discriminatory within the class to which the parking privileges are granted for it gives the same rights to all common carriers. The fact that specific zones are designated on a public street for the loading and unloading of passengers by common carriers does not render the ordinance unreasonable or discriminatory as to owners of property or private enterprises adjacent to such areas. The time limit fixed for the common carriers to park for such purpose is reasonable, and the permitted use in the interest of the public." p. 85 of 196 Va.

A case cited to the Court which was decided in 1925 in the Supreme Court of the State of Washington shows that the sometimes rough treatment which the automobile receives in legislative bodies is nothing new. It is the case of *Kaufman v. West*, 233 P. 321. There an ordinance made it unlawful for any owner, occupant or visitor of any apartment house or the servant or employee of any of the foregoing to park his automobile on any street adjacent to an apartment house, except "adjacent to and on the same side of the thoroughfare . . . to which said apartment house is or shall be appurtenant." The Court found the ordinance to be plainly violative of the privileges and immunities clause of its state's constitution.

> "It is . . . discriminatory in that it does not operate alike on all persons and property under the same circumstances and conditions, and is therefore class legislation in discriminating against some and favoring others." 233 P.321, 322.

The case of *State of Maine v. Rush*, 324 A.2d 748, (Sup. Jud. Ct. of Me., 1974) was an appeal from a conviction of the violation of a parking ordinance in the city of Portland. The ordinance prohibited the parking of any motor vehicle on any street for longer than thirty minutes between the hours of two o'clock A.M. and six o'clock A.M. except for physicians or others on emergency calls. The defendant conceded the authority to enact the ordinance but asserted that the public protection gained was not equally available to all resident tenants in the city. His contention was that the application of the ordinance to him was so burdensome as to become discriminatory. The ordinance made no classifications and was applicable to all.

The *Rush* case and the *Belle Terre* case were argued to stand for the principle that (1) so long as the legislative objective is legitimate, (2) the means employed appropriate, and (3) the manner of exercising the power not unduly arbitrary, then a governing body may discriminate in making its classifications unless it is operating in the "sensitive" areas of race, religion, sex, etc. That appears to be an over-simplification, for in *Rush* the Court said:

> "Although variously expressed, it is established that the requirements of due process exact that the law shall not be unreasonable, arbitrary or capricious and that the state's police power can be properly exercised only when there is a reasonable relationship to the public health, safety, morals, or welfare." 324 A.2d 752.

The case of *State v. Whisman*, 263 N.E.2d 411, is interesting in that it is the only case which could be found dealing with the subject of parking permits. It was decided in a Court of Common Pleas in Ohio, a trial court which was exercising its appellate jurisdiction from a mayor's court. The ordinance which was under scrutiny prohibited the parking of vehicles on a certain street. It further provided for the issuance of parking permits to vehicle owners who resided on that street and if there were spaces to spare then other residents of the town could get them. The Court found that no valid justification for the classification existed and declared the ordinance unconstitutional.

A review of these authorities indicates that the two ordinances which attempted to restrict parking based on the residence of the car's owner have met unhappy endings in the courts. Those ordinances were not as carefully drawn as the one here, but their purpose was to create two classes of people and to favor one at the expense of the other. In the *Whisman* case if one did not live on Stanton Street, he got no parking permit. In *Kaufman*, if one lived or visited or worked in an apartment, he couldn't park across the street.

In this case the Court has had the benefit of the testimony of transportation experts, planners, ecologists, a representative of the Environmental Protection Agency as well as others. The ordinance's preamble sets forth laudatory objectives. The evidence in the case, however, does not show that the classification made bears any reasonable relationship to the stated objectives. The classification to be valid must not be arbitrary or capricious and it must be reasonable. The classification made in this ordinance creates two classes, i.e., those who reside in the permit area, and those who do not. The place of residence of the owner of a motor vehicle or his

place of employment have nothing to do with the traffic conditions, pollution, noise, trash and refuse thrown from vehicles, access to one's residence, the cleanliness and safety of the streets, property values, the safety of children or pedestrians, or the general welfare of the people of Arlington. The Court therefore concludes that the classification made here is arbitrary and unreasonable.

For the foregoing reasons the application of the ordinance to the petitioners is found to be violative of their rights under the due process clauses of both the state and Federal constitutions as well as a denial of the equal protection of the laws secured under the Federal constitution.

A question was raised at oral argument of the status of petitioners Borkowski and Richards to question the validity of the ordinance. Both have standing although neither used the permit zone before it became restricted.

Counsel should prepare a decree in the consolidated case incorporating therein by reference this letter memorandum, dissolving the temporary injunction and granting the petitioners relief.

Very truly yours,

/s/William L. Winston
William L. Winston
Judge

WLW:kw

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 14th *day of* January, 1977.

County Board of Arlington County, Bert W. Johnson, County Manager of Arlington County, and Roy McLaren, Chief of Police of Arlington County, — Appellants,

against Record No. 760056

Rudolph A. Richards, Mario A. Carboni, Thomas Beck, Braxton H. Tabb, Jr., Michelle McKenzie, Elmer P. Borkowski, Ernest G. Wallace, Joseph F. Belfiore, Jr., Carolyn Bolling, Howard E. Hurley, Jr., James Mott, H. D. Morris, George A. Riscili and Ray Elbert Parker, — Appellees.

Upon an appeal from final orders entered by the Circuit Court of Arlington County on the 16th day of September, 1975.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the orders aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the orders appealed from. It is therefore adjudged, ordered and decreed that the said orders be, and the same are hereby, affirmed, and that the appellants pay to the appellees thirty dollars damages, and also their costs by them expended about their defense herein.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

/s/ H.G. Turner
Clerk

Appellees' costs:

Attorney's fee	$50.00
Cost of printing briefs not to exceed $200 for each appellee—Code, § 14.1-182	?

Teste:

/s/ H.G. Turner

Clerk

APPENDIX D

May 18, 1974

AMENDMENT AND REENACTMENT OF SECTION 29, ZONING ORDINANCE, RE STREET PARKING IN RESIDENTIAL DISTRICTS.

On motion by Mrs. Bozman, seconded by Mr. Purdy and carried by a vote of 4 to 0, Mr. Fisher having left the meeting, voting recorded as follows: WHOLEY—AYE; BOZMAN—AYE; MUNSEY—AYE; PURDY—AYE; the Board adopted the following amendment and reenactment of Section 29 of the Zoning Ordinance as contained in the Appendix of the Arlington County Code, to create new Subsection D, relative to restricting street parking in districts in which commercial and industrial uses are not permitted:

The County Board of Arlington County, Virginia, hereby ordains that in order to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the Conditional Uses allowed it. Special Districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, 'good order, comfort, convenience and welfare of the inhabitants of the County,

Section 29D of the Zoning Ordinance is enacted as follows:

D. RESTRICTIONS ON PARKING IN DISTRICTS IN WHICH COMMERCIAL AND INDUSTRIAL USES ARE NOT PERMITTED.

1. Whenever the County Manager or his designee shall determine that the streets of a particular district or discrete portion of a district in which residential uses are permitted and commercial and industrial uses are not permitted, except transitional uses or by conditional use permit, are being used for parking by the operators of vehicles while the operators of those vehicles are using districts in which commercial or industrial uses are permitted or portions of districts in which Conditional Special Uses have been permitted under Section 3.A.9.a-c. of the Zoning Ordinance and the average number of vehicles parking in such a manner is in excess

of 25% of the number of parking spaces on such streets and the total number of spaces actually occupied by any vehicles exceeds 75% of the number of spaces on such streets on the weekdays of any month, as disclosed by an engineering study, the County Manager or his designee shall prohibit parking during the hours when such use has been found on those streets of those districts or portions of districts found by the survey to have been so affected. In such cases the County Manager shall cause appropriate signs giving notice of the prohibition to be posted on those streets restricting all parking except parking by the holders of permits to be granted only under the following conditions:

a. To persons who are residents of any particular area in which parking is so restricted for every vehicle owned by those persons and registered in the County;

b. To persons who are visitors of any residents of any particular area in which parking is so restricted, to be limited to that particular area in which parking is so restricted, to be valid for a stated period but no more than 30 days, and not to be to any more than two persons who are visitors at a residence during any period in which another visitor to that residence holds such a permit; and

c. To persons who do business with any resident of any particular district in which parking is so restricted during the hours of such restriction, to be limited to that particular area or areas in which parking is so restricted and in which any such person so transacts business.

However, the parking prohibitions of this section 29D shall not apply to service of delivery vehicles which are being used to provide services or make deliveries to dwellings.

On the application of any resident of the district, the Chief of Police or his authorized designee may issue permits to be valid for only one day and for no more than four hours on that day upon a showing by the resident that during the hours for which the permits are to be issued, his residence will be used in such a way consistent with its residential character and other provisions of law that visitors to his residence would not be able to park without violating the law. If the Chief of Police shall find the foregoing facts and further find that the issuance of the permits will not unduly impair traffic safety during the time of their validity, he shall issue such permits and may limit the streets or portions of streets on which they shall be valid. The number of such permits shall not any time exceed 50% of the number of spaces in which they are valid.

2. Any such person shall show to the County Manager or his authorized representative satisfactory evidence that he fulfills all the conditions for such a permit. Whenever the conditions no longer exist, the person holding such a permit issued under subparagraph 1(a) or 1(c) shall surrender it to the County Manager or his authorized representative. It shall be unlawful for any person to represent that he is entitled to such a permit when he is not so entitled, to fail to surrender a permit to which he is no longer entitled, or to park a vehicle displaying such a permit at any time when the holder of such permit is not entitled to hold it. No permit issued hereunder shall be valid for more than one year, but may be renewed upon expiration, provided the conditions for issuance exist.

3. The signs placed in such areas shall be of such character as to inform readily an ordinarily observant person of the existence of the rules and regulations imposing the foregoing restrictions. It shall be unlawful for any person to violate such rules and regulations.

4. Wherever metered parking is in effect in any portion of a district that becomes subject to the restrictions of this paragraph D, the parking spaces controlled by meters may be excepted from the provision of this paragraph so long as the control by meters continues.

5. Nothing in this Section 29.D. shall repeal or supersede any other provision of law which provides authority to regulate parking.

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APPENDIX E

[Seal]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

November 18, 1974

Mr. Charles G. Flinn
Assistant County Attorney
Office of the County Attorney
Greely Building
2100 14th Street, North
Arlington, Virginia 22201

Dear Mr. Flinn:

Your letter of September 24, 1974, requested approval of the Arlington County ordinance regarding on-street parking in residential areas. The ordinance was submitted in partial satisfaction of the requirements of 40 CFR 52.2435(c), which requires Arlington County, among others, to impose on-street parking restrictions on work commuters in areas of high employment density which

are defined as "adequately served by mass transit." The Commonwealth of Virginia is required to submit for approval by the Environmental Protection Agency a list of areas designated as "adequately served." It was suggested in the Preamble to 40 CFR 52.2435(c) (Daily Ed., 38 FR 33706, December 6, 1973) that Crystal City is such an area, but final designation has not yet been made by the Commonwealth.

In its present form, Arlington's ordinance relates only to residential areas and not to other commercial portions of Crystal City. Thus, the ordinance will be approvable only in partial satisfaction of the requirements of 40 CFR 52.2435(c). To comply fully with the regulation, on-street parking would have to be restricted also in those portions of Crystal City which are nonresidential, and the restriction would have to be effective in both commercial and residential portions from 7 a.m. to 7 p.m. Mondays through Fridays.

However, as far as it goes, it is our judgment that the ordinance can be approved. It appears to be a reasoned approach to address, among other community needs, degrading air quality due to excessive commuter parking.

We appreciate the lead Arlington County is taking in this matter and look forward to full submission following final designation of "adequately served" areas by the Commonwealth.

Sincerely yours,

/s/Alan G. Kirk II
Alan G. Kirk II
Assistant Administrator for
Enforcement and General Counsel (EG-329)

cc: Mr. Daniel Snyder, Administrator, Region III

Supreme Court, U. S.
FILED
AUG 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1418

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, *et al.*,

Petitioners,

v.

RUDOLPH A. RICHARDS, *et al.*,

Respondents.

BRIEF OF RESPONDENTS RUDOLPH A. RICHARDS, *et al.* IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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3316 Parkside Terrace
Fairfax, Virginia 22030
Counsel for Respondents, Rudolph A. Richards, et al.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

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COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, *et al.*,

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Respondents.

BRIEF OF RESPONDENTS RUDOLPH A. RICHARDS, *et al.* IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether a County Ordinance purportedly enacted for the purpose of protecting residential neighborhoods from polluted air, excessive noise, trash caused by vehicles entering the neighborhood to park, loss of residential character, inefficiency in street maintenance, danger to children and loss of property values, which grants to the occupants of one hundred one (101) buildings adjoining limited portions of three specific

public streets a monopolistic privilege to park an unlimited number of motor vehicles at no expense to said occupants upon the said limited portions of public streets while denying to all other occupants of other buildings located elsewhere the equal right to park motor vehicles upon the said limited portions of public streets, is an arbitrary and unreasonable classification violative of the equal protection rights of the Constitution of the United States of America.

STATEMENT OF THE CASE

Several years ago, Petitioner, the County Board of Arlington County, hereinafter referred to as "County", authorized and permitted the erection and construction of many high-rise, high density buildings, (Rec. 157, 158)[1] including offices, hotels, apartments, theaters, and mercantile stores, (Rec. 160), in an industrial zoned area bounded on one side by a residential area and bounded on the other side by railroad yards and the National Airport in the southern part of Arlington County, Virginia. At that time, County failed to require that the developers of the said buildings provide sufficient off-street parking for motor vehicles sufficient to meet the needs of the thousands of persons who would use the said buildings. (Rec. 171, 172, 94). As a result of such failure, many of the present occupants of the said buildings, such as Respondents, hereinafter referred to as "Government Employees", who must commute by automobile to their work in such buildings, owing to inadequate public transit facilities, are forced to park their automobiles during normal daytime working hours in the public streets in the adjoining residential neighborhood, as well

[1] "Rec." refers to the Appellant's Appendix filed with the Supreme Court of Virginia on appeal below.

as on the public streets immediately adjacent to the high-rise buildings. (Rec. 48, 49).

Approximately seventy-six (76) residents out of the aforesaid residential area which contained several hundred families, (Rec. 88), although having adequate off-street parking for their own automobiles, did not like the appearance of automobiles, other than their own, parked on the public street in front of their dwelling places. (Rec. 179). Accordingly, they banded together in an organization, termed a "Citizen's Association", which purported to represent an entire community of several hundred families, and brought political pressure upon County and Petitioner, Bert W. Johnson, hereinafter referred to as "Manager", to prohibit all persons other than themselves from using the public streets in front of their dwellings for the parking of motor vehicles. (Rec. 335, 160, 82, 83, 84).

County and Manager, in 1972, in response to said pressure, put into operation a "Permit Parking Plan" which, in effect, gave to the occupants of the 101 dwelling places adjoining limited parts of three public streets exclusive rights to park anywhere on the said parts of public streets during the hours of 8:00 A.M. to 5:00 P.M., Mondays through Fridays of each week, excluding holidays. (Rec. 49, 52, Pl. Ex. #3, Rec. 160).

A number of persons employed in the aforesaid high-rise buildings subsequently brought suit in the Circuit Court of Arlington County, Virginia, and succeeded in having the Court declare the said Permit Parking Plan invalid. (Rec. 163).

Thereafter, County revised its ordinances, and in 1974 introduced and placed into operation with the assistance of Manager and Petitioner, Roy McLaren, hereinafter referred to as "Chief", a modified and

renovated Permit Parking Plan, (Rec. 163, Pl. Ex. #1), which operated upon the identical streets and areas as the earlier plan. (Pl. Ex. #3). The Permit Parking Plan, as implemented and enforced most recently, grants to persons who happen to reside in 101 specific buildings, (Pl. Ex. #3, Rec. 51), an exclusive privilege, at no expense to such person, to park an unlimited number of motor vehicles of any size, shape or configuration registered at the address of the said buildings, (Pl. Ex. #1), on the aforesaid three public streets which contain 153 automobile size parking spaces, (Rec. 52, Pl. Ex. #3), during the hours of 8:00 A.M. through 5:00 P.M. every Monday through Friday, excepting holidays. (Pl. Ex. #1). With the exception of service or delivery vehicles, unmarked vehicles that do business with a resident of the said 101 buildings and overnight visitors to the said buildings, all other vehicles are prohibited from parking on the said designated portions of streets during the said hours and violation of the prohibition is a crime which is punishable as a misdemeanor. (Rec. 50, Pl. Ex. #1, Pl. Ex. #3).

The preamble to the ordinance enacted by County to provide authority for the Permit Parking Plan states that its purpose is to protect residential neighborhoods from polluted air, excessive noise, trash caused by vehicles entering the neighborhood to park, loss of residential character, inefficiency in street maintenance, danger to children and loss of property values. (Pl. Ex. #1)

At the time of trial below, Government Employees, four of whom were residents and citizens of Arlington County, Virginia; three of whom were residents and citizens of Alexandria, Virginia; five of whom were residents and citizens of Fairfax County, Virginia; and two of whom were residents and citizens of the District

of Columbia, and all of whom were employed in the aforesaid high-rise buildings, and who all, with the exception of Rudolph A. Richards, commuted to work by driving their own automobile, (Rec. 46-49, 80-82, 96-99, 106-107, 116, 119, 123, 124, 134-136, 140-141, 151-152, 208-211), testified that they were very familiar with the neighborhood covered by the Permit Parking Plan, both before the plan was put into operation and after, having not only parked almost daily on the streets involved, (Rec. 55, 99, 109, 125, 141, 152, 209), but also having walked along the said streets twice a day five days a week for many years. (Rec. 55, 81, 99, 109, 117, 126, 141, 152, 209). Government Employees testified that there were no problems in the said neighborhood prior to the plan insofar as air quality, noise, trash, loss of residential character, street maintenance, danger to children, and loss of property values was concerned. (Rec. 56-59, 84-87, 99-101, 110-111, 117-120, 126-127, 142-148, 153-154). Likewise, all testified that there was little change in the neighborhood after the Permit Parking Plan was put into operation, except the cars that used to park on said streets were parked a few blocks further away. (Rec. 59, 60, 87-91, 101-102, 111-114, 120, 128, 145-148, 154-156). There was some testimony that occasionally smells were noticed from County's trash incinerator, (Rec. 60, 61, 90-91, 144), and from County's sewage treatment plant, (Rec. 61), each of which is only a few blocks removed from the said neighborhood, (Rec. 61). Likewise, there was testimony about the proximity of the neighborhood to National Airport with the noise of jet planes taking off and the noise and probable air pollution caused by U.S. Highway No. 1 and Interstate Highway No. 95 which border the said neighborhood on two sides. (Rec. 62, 143). There was no testimony or evidence produced that any air pollution existed in the neighborhood or in Arlington County.

A viewing by the Trial Court of the neighborhood as a whole disclosed that adjoining public streets in the same neighborhood not controlled by the Permit Parking Plan were controlled by switch parking, i.e. no parking on one side of the street in the A.M. and no parking on the opposite side of the street in the P.M. (Rec. 322, 323), by metered parking or by "No Parking" restrictions. Fewer parked cars were observed on switch parking streets than on streets controlled by the Permit Parking Plan.

The true objective of the Permit Parking Plan was to deny Government Employees the right to park on the public streets designated while at the same time reserving the said streets and the said 153 parking spaces for the use or non-use of the occupants of the said 101 buildings. (Rec. 162). The sole criteria for determining eligibility to park on the streets covered by the Plan is residence next to the street. (Rec. 167). The persons desiring the Permit Parking Plan wanted the public streets covered by the Plan free of Government Employees vehicles because the sight of such automobiles offended their aesthetic senses. (Rec. 179).

The Permit Parking Plan does not treat all citizens alike, even in the same neighborhood. Respondent, Rudolph A. Richards, although living on a street not under the plan, lives in the identical neighborhood covered by the plan. His home is one block away from the streets reserved for his neighbors. (Rec. 81). Richards does not have parking restrictions on the public street in front of his house. (Rec. 91). Anyone can park in front of his house, including his neighbors privileged by the Plan. Richards can not park in front of his said neighbors house.

Respondents testified that there was inadequate public transportation to meet their needs in commuting to their places of employment.

Government Employees brought the action in the Circuit Court of Arlington County, Virginia, to have the Permit Parking Plan declared invalid as in violation of their federal and state Constitutional rights.

The Circuit Court of Arlington County found that the Permit Parking Plan as applied to Government Employees violated their rights under the due process clause of the State and Federal Constitutions and denied to them the equal protection of the laws under the Federal Constitution. (App. B.)[2]

Petitioners promptly after learning of the Circuit Court of Arlington County decision instituted a switch parking restriction on the very same portions of public streets as had been covered by the restrictions of the Permit Parking Plan.

Respondents subsequently appealed the decision of The Circuit Court of Arlington County to the Supreme Court of Virginia where the lower court decision was affirmed. (App. C)[3]

REASONS FOR DENYING A WRIT OF CERTIORARI

ARGUMENT

A writ of certiorari for the review of a State Supreme Court decision should be granted only where there are special and important reasons for such a review. *Rule 19, Rules of the Supreme Court of the United States.* While the power to issue a writ of certiorari is a comprehensive and unlimited one it should be exercised

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[2]App. B refers to Appendix B of Petition for Writ of Certiorari herein.

[3]App. C refers to Appendix C of Petition for Writ of Certiorari herein.

sparingly and only in cases of gravity and importance. *Rogers v. Helvering*, 320 U.S. 410, 88 L.Ed. 134, 64 S.Ct. 172, (1943). No such reasons exist for reviewing the per curiam decision of the Supreme Court of Virginia.

If the writ is denied no special and important problems will arise. No insurmountable problems for governmental entities attempting to solve difficulties arising out of the growth of the population and the public's dependence upon motor vehicles for transportation will develop. Permit Parking Plans such as the one adopted by Arlington County which grant monopolies in the use of public streets to a limited and select class of persons are not the only answer to problems of traffic, air pollution, noise, littering, ease of ingress and egress to property, efficiency in maintaining streets and preservation of residential values. If vehicles parked on public streets are an evil per se such remains an evil regardless of the ownership of said vehicles. If parked cars create problems there are adequate solutions to such problems other than the creation of a privileged class in society whose members enjoy a use of the public streets denied to all others.

Petitioners argue two reasons for granting a writ. First it is argued that the Virginia decision conflicts with "the entire body of law that has grown up around . . . The Equal Protection clause." Secondly it is argued that "many communities throughout the country have acted or are considering acting as Arlington" did in developing a Permit Parking Plan.

I.

THERE IS NO CONFLICT IN THE LAW OR DECISIONS OF VARYING JURISDICTIONS REQUIRING RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES.

1. Consider the first stated reason. Does the Virginia decision in fact conflict with "the entire body of law"?

The U.S. Supreme Court has not ruled upon a Permit Parking Plan. Likewise, the lower federal courts have not ruled upon such a plan. One of the early state court decisions involving a form of parking restriction aimed at an arbitrary and unreasonable classification of motorists arose when the City of Chehalis, Washington, enacted an ordinance which provided that it was unlawful for any owner or any occupant or any visitor of an apartment house or the servant or employee of any of the said persons to park his automobile on any street adjacent to an apartment house, excepting only that portion of the street "adjacent to and on the same side of the thoroughfare . . . to which said apartment house is or shall be appurtenant." The Supreme Court of Washington, in a well-reasoned opinion, held that the ordinance restricted only the owners, occupants, visitors and employees of an apartment house from parking their automobiles where they might have seen fit and accordingly violated the Washington State Constitution which prohibited enactment of laws which granted to any citizen or class of citizens privileges or immunities which upon the same terms would not equally belong to all citizens. The court stated that the parking ordinance was unjust, unreasonable and discriminatory, in that it did not operate alike on all persons and property under the same circumstances and conditions and was therefore class legislation in discriminating against some and

favoring others. *Kaufman v. West,* 133 Wash. 192, 233 Pac. 321 (1925). The courts of Virginia said much the same thing about the Arlington ordinance. No conflict appears between said decisions, although they deal with different ordinances and constitutions. The theory and logic are the same.

State v. Whisman, 24 Ohio Misc. 59, 263 N.E.2d 411, (1970), involved a Permit Parking Plan of the City of New Boston, Ohio, that was almost identical to the Arlington plan. In holding that the new Boston plan violated the equal protection requirements of both the U.S. and Ohio Constitutions the court said, "although an owner of premises abutting on a street possesses the right of ingress and egress, he has no right superior to that of any other member of the public at large to park automobiles in front of his premises." The court further indicated that the new Boston ordinance ". . . unequivocably confers upon the residents of the areas involved the exclusive first right to park vehicles in those areas" and that the ordinance "creates rights in residents of the area superior to other citizens of New Boston" and "absolutely discriminates against all persons who are not residents of new Boston, by making it an offense for them to park in the area.

The Virginia decision follows the Whisman case. There is no conflict between the two decisions requiring resolution by the U.S. Supreme Court.

In 1974 Montgomery County, Maryland, adopted a Permit Parking Plan ordinance which operates similarly to the Arlington ordinance. Very recently a Bethesda, Maryland, businessman whose place of business on Wisconsin Avenue adjoins a twenty-five square block residential area set aside by Montgomery County for parking by residents only was ticketed for parking in the set-aside area, one and a half blocks from his place of

business, without a permit. He appealed his conviction of violation of the ordinance to the Circuit Court of Montgomery County based upon violation of his constitutional rights. In a carefully thought out opinion the court ruled that the Montgomery County ordinance violated the 14th Amendment by making an unreasonable classification which amounts to class legislation. The court stated that the public streets are for the use of all people and that no one has an absolute right to park in front of his home. *State of Maryland v. William L. Thompson,* Cir. Ct. Montgomery County, Crim. No. 19018.[4] Here again, there is no conflict with the Virginia decision as to the principles of law enunciated.

The only other court decisions involving Permit Parking Plan ordinances are distinguishable from the Arlington ordinance.

The City of Cambridge, Mass. enacted an ordinance which permitted all residents of the city to obtain parking permits, but denied such permits to nonresidents. A non-resident attorney who parked on the city streets while attending court in Cambridge was ticketed for such parking without a permit and was subsequently found guilty of violating the ordinance. He appealed the traffic court conviction to the local Superior Court seeking a jury trial. The jury trial was never held since the Superior Court referred the question of the constitutionality of the ordinance directly to the Supreme Judicial Court of Massachusetts as is permitted under Massachusetts law. The latter court in its opinion stated that the Arlington ordinance was founded upon a different basis than the Cambridge ordinance and held that the non-resident attorney had failed to prove that the classification made by the Cambridge traffic director was invidiously

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[4]See Appendix to this brief.

discriminatory, thus the Cambridge ordinance was not unconstitutional. *Commonwealth v. Petralia*, No. M-729, Supreme Judicial Court of Massachusetts, decided April 29, 1977. Upon return of the case to the Superior Court it was dismissed by the court upon its own motion without a trial being held.

The Virginia courts accepted the evidence submitted by Respondents in their suit attacking the Arlington ordinance and found that the classification was arbitrary, unreasonable and invidiously discriminatory. As such the Virginia decision is not in conflict with the Massachusetts decision.

A Permit Parking Plan has also been established in the District of Columbia. Upon certain streets anyone, resident and non-resident alike, can park but only for two hours per time. Residents of the area can obtain a permit, upon payment of a $5 fee, which allows them to park without a time limitation. The ordinance has been contested before the District of Columbia Superior Court where a preliminary injunction was issued upon the basis of unconstitutionality. Many months later upon further proceedings before a different judge the suit was dismissed. *Georgetown Association of Businessmen v. District of Columbia*, D.C. Super. Ct., Civ. No. 7242-76. An appeal of the latter action is now pending.

The District of Columbia decision is not in conflict with the Virginia decision since the ordinances involved are quite dissimilar. Moreover, the District case has not yet been decided by the court of last resort within the jurisdiction.

Since the Virginia decision does not truly conflict with existing case law dealing with Permit Parking Plans, Petitioners argue that the Virginia decision conflicts with the broad general principles of law covering the equal

protection guaranty of the Constitution as declared by the U.S. Supreme Court in cases involving things other than Permit Parking Plans. Such an argument is without merit.

As a general rule, license or permit legislation that discriminates against non-residents of a state or non-residents of a political subdivision of a state, either by refusing to grant licenses or permits to such non-residents or by granting them on different terms where not required under the police power of the state is void as violating the federal Constitution. *Mullaney v. Anderson*, 342 U.S. 415, 96 L.Ed. 458, 72 S.Ct. 428, (1952); *Chalke v. Birmingham & N.W.R. Co.*, 249 U.S. 522, 63 L.Ed. 748, 39 S.Ct. 366, (1919). Arlington denies permits to non-residents of a local area within a neighborhood.

Although licensing and granting of permits may be a valid and lawful exercise of the police power of a local government any licensing requirements imposed on a given class must apply equally to all members of the class, may not discriminate among members of the same class, and may not, therefore, exempt only certain members of a class from an imposition placed on other members. *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 54 L.Ed. 688, 30 S.Ct. 496, (1910). The Arlington ordinance concerns itself with motorists who wish to park their vehicles on the public streets. Such is the class. The ordinance divides the class into two subclasses, namely; motorists who are residents of properties abutting limited portions of three public streets and all other motorists.

In enacting license or permit legislation, local governments may resort to classifications provided the classification is reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons

in similar circumstances are treated alike. *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183, 81 L.Ed. 109, 57 S.Ct. 139, 106 ALR 1476, (1936). There is no reasonable basis for dividing motorists into two subclasses based solely upon residence or non-residence abutting upon a specified public street. The Arlington ordinance does not apply to all motorists equally, discriminates against some and favors others, makes the act of parking a motor vehicle under certain circumstances a misdemeanor as to some motorists while exempting other preferred motorists from the same restrictions and all without a valid public purpose.

The Circuit Court of Arlington County after a lengthy trial on which it had benefit of the testimony of transportation experts, planners, ecologists, a representative of the Environmental Protection Agency and many others, found that the Arlington classification bore no reasonable relationship to the stated objectives of the ordinance. A motorist's place of residence or his place of employment have nothing to do with traffic conditions, pollution, noise, trash and refuse thrown from vehicles, access to one's residence, the cleanliness and safety of the streets, property values, the safety of children and pedestrians and the general welfare of Arlingtonians.

The requirement for a reasonable ground of differences among classes established does not demand great differences, but it does contemplate substantial differences. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 77 L.Ed. 929, 53 S.Ct. 481, 85 A.L.R. 699, (1933). Classification must rest on real not feigned differences and the distinction between the classes must have relevance to the purpose for which the classification is made. *Morey v. Doud*, 354 U.S. 451, 1 L.Ed.2d 1485, 77 S.Ct. 1344, 134 A.L.R. 841, (1957); *Walters v. City of St. Louis*, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505,

(1954). Motorists are motorists regardless of where they reside. The real purpose for which the Arlington ordinance was enacted was to give to a select group of citizens exclusive rights in the streets abutting their residences as was proven by the testimony of those very same citizens at the trial below.

There is no conflict between the existing case law as it concerns Permit Parking Plans and the decision of the Supreme Court of Virginia nor is there any conflict between the Virginia decision and the broad general principles of law covering the equal protection guaranty of the Constitution as spelled out by decisions of the U.S. Supreme Court. There is no conflict of law to be resolved by the court and no special and important reason for granting a writ of certiorari herein.

II.

THE EXISTENCE OF PERMIT PARKING PLANS IN OTHER JURISDICTIONS NOT IDENTICAL TO THE ARLINGTON ORDINANCE AND THE MERE POSSIBILITY THAT ADDITIONAL COMMUNITIES MIGHT ADOPT SUCH ORDINANCES ARE NOT REASONS OF SUFFICIENT AND SPECIAL IMPORTANCE TO WARRANT REVIEW OF THE DECISION OF THE SUPREME COURT OF VIRGINIA DECLARING THE ARLINGTON ORDINANCE INVALID.

2. Consider now Petitioner's second and only other reason given for granting a writ of certiorari, namely, that "It is important that the decision . . . be reviewed . . . because residents' parking permit ordinances generally similar to Arlington's have been enacted or are being considered in many communities." The prior enactment of Permit Parking Plans similar to the Arlington ordinance and the possibility that other local governments might enact similar plans is not sufficiently

special and important to warrant a U.S. Supreme Court review at this time.

Petitioners do not assert to the court that another community has adopted a Permit Parking Plan ordinance identical to the Arlington ordinance. Thus the decision of the Virginia court will not necessarily be controlling if another court should review a different ordinance. Such has already occurred in Massachusetts where the Massachusetts court distinguished the Cambridge ordinance from the Arlington ordinance. The Massachusetts decision is not binding upon the Virginia courts anymore than the Virginia decision, which was first in time, was controlling in the Massachusetts case. Both decisions involved different ordinances as applied to differing facts. If the writ of certiorari is denied the Virginia decision will not be an absolute bar to the adoption of Permit Parking Plans by other communities. The only way that the Virginia decision would likely serve as an absolute bar would arise in the event another community attempted to enact and enforce an ordinance identical, except as to the geographic location, to the Arlington ordinance. Refusal by the U.S. Supreme Court to grant a writ of certiorari herein will merely leave the Virginia decision undisturbed.

Of the various other communities claimed by counsel to have ordinances similar to Arlington all except four have been the subject of litigation which has been discussed herein and none of those discussed, at this stage of proceedings, creates a special and important reason for review by the Court. As to the other four jurisdictions there has been no showing that the ordinances involved are sufficiently similar to the Arlington ordinance as to be affected by non-review of the same by this court. It would be a waste of this court's valuable time to review the Virginia decision based upon the mere possibility that

the ordinance of four other localities might be similar to the Arlington ordinance. It would be even more wasteful to consume the court's efforts in a review of the Virginia decision because there may be unknown local governments which might be considering adoption of a Permit Parking Plan.

The Petitioner's second asserted reason for granting a writ of certiorari herein should be rejected as not special and not important. The writ should be denied.

III.

DENIAL OF A WRIT OF CERTIORARI WILL NOT INTERFERE WITH OR PREVENT THE CONTROL OF AIR POLLUTION.

3. The Memorandum for the United States as Amicus Curiae submitted herein claims that the Arlington ordinance "arose out of the quest to reduce air pollution emitted from automobiles." A second assertion is that if the Virginia decision is allowed to stand without review other strategies to control air pollution will have to be devised. The Memorandum infers that control of air pollution was the major purpose of the ordinance, that the ordinance would effectively control air pollution, and that without the Arlington ordinance, air pollution will be uncontrollable.

Respondents disagree with the position taken by counsel for the United States.

Parked cars do not create air pollution. Parked cars on public streets do not create air pollution. Cars create or contribute to air pollution only when operating and it makes no difference in the amount of pollution whether the car is operated by a resident or non-resident of the area being polluted. Moreover, if air pollution is contributed to by operated vehicles the amount of air

pollution existant is not solely determined by the origin or destination of the journey made by the vehicle. Commuters from the outer suburbs may drive further than inner city residents to get to work but inner-city residents drive further than outer suburban commuters in visiting the ultramodern amenities of suburban shopping centers, golf courses and other suburban attractions. Substituting 156 parked cars of local residents for 156 parked cars of commuters upon limited portions of three public streets won't necessarily lessen air pollution.

The United States Environmental Protection Agency is in favor of reducing the amount of automobile driving being done in the Metropolitan Washington, D.C. area. There was evidence of the same produced by the Petitioners in the trial below. The United States infers that not only is the Arlington Permit Parking Plan ordinance the only effective approach to the control of air pollution available at this time but also that the plan does in fact control pollution.

There was no evidence produced at the trial below that the Arlington ordinance effectively controlled or lessened pollution. Moreover, there was no evidence that any air pollution in fact existed in the neighborhood affected by the ordinance. The only evidence concerning the quality of the air in the Permit Parking Plan neighborhood was produced by Respondents and it disclosed that the air quality was good both before and after enactment of the ordinance.

At the time of the trial below the Court's viewing of the restricted neighborhood and its surrounding environs disclosed that alternative parking controls, such as "switch parking," "limited time period parking," "no parking" and "metered parking," were in existence and being employed in the same neighborhood. It was also disclosed that some of the said alternative parking

controls were more effective than the Permit Parking Plan. The major difference between the alternative parking controls and the Permit Parking Plan is that only the Permit Parking Plan fails to treat all motorists the same.

If the operation of motor vehicles is a malady and limitation of operation is the cure, then all citizens should be required to partake of the medicine. The cure should not be forced upon those alone who reside at the perimeter, or beyond, of the Metropolitan area. The evidence at the trial disclosed that most, if not all, of the residents of the Permit Parking Plan area are owners of motor vehicles. Not one of the said residents complained of air pollution and they were the moving force that brought about the enactment of the ordinance. The major purpose of the ordinance was not control of air pollution. The ordinance arose out of the local residents' desire to reserve the parking portions of the public streets abutting their residences for their own exclusive use.

If the writ of certiorari is denied herein the United States, the State of Virginia, and the County of Arlington will not be forced to devise new methods to control air pollution. The alternative methods of pollution control have been in existence since times prior to the Arlington Permit Parking Plan ordinance. The alternative means can be used now and are being used now. Restrictions on parking such as those contemplated by the Arlington ordinance are not the answer to the problems of air pollution. The only thing accomplished by the Arlington ordinance is to give special privileges to a very few citizens while denying them to all others.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Criminal No. 19018

STATE OF MARYLAND

v.

WILLIAM L. THOMPSON

MEMORANDUM

This matter comes before the court on appeal from a conviction of the defendant for violation of parking of his vehicle without a permit in an area providing for parking by permit only. All the facts have been stipulated and show that he was parking approximately one-half block from his place of business on Wisconsin Avenue in Bethesda (State's Ex. #1). The position on the street where he had parked was in a 25 square-block area which the County had set aside for residents only (State's Ex. #2) pursuant to Section 31-48A of the Montgomery County Code, adopted in 1974. The procedure was to issue the residents permits and this defendant, although a businessman in the area, was not a resident and did not therefore have a permit.

The defendant has filed his motion to dismiss on the basis that it denies him equal protection of the law under the Fourteenth Amendment of the United States Constitution, and the motion is resisted by the State's Attorney for Montgomery County. The County Attorney did not

participate, and the court was advised during argument that he does not share the views of the State's Attorney. Permits in the entire area were issued to residents only for their convenience in parking on public streets in front of their homes.

Similar attempts to restrict parking have been made in other jurisdictions throughout the country, and much publicity has been given on this subject generally. Local governments have an interest in regulating problems on public streets and if these regulations come within the legitimate area of police powers, namely, health, safety or morals, the ordinance will be upheld. The principle generally is that the regulation will not be disturbed so long as the classification rests upon some rational basis. The sole question, therefore, is whether this regulation providing for permits to residents in the area but denying them to any other person is a reasonable classification and one essential to the work of the government and a valid exercise of the police power. If parking is restricted as to time and fines are assessed equally to all parkers, or if parking is prohibited in some areas to all persons, this is perfectly proper. The ordinance involved, in its preamble, speaks of safety of the residents, but this cannot be considered a safety regulation since it creates no more and no less vehicular parking spaces. It speaks of health and the State suggests a threat of air pollution. It is not a persuasive argument to say that a residential parking permit program will abate air pollution. It speaks of need for residents to be close to their homes, but business enterprises also have a need for customers to be close to their place of business. Business people who are restricted from obtaining permits in this highly concentrated area in and immediately adjacent to a Bethesda business district may sustain economic damage, their employees may be unable to find adequate

alternative transportation, their customers may go elsewhere, and there are many other potential economic disadvantages immediately apparent. It speaks of the need for use of parking by visitors, but this ordinance prefers residents over visitors.

This type of an attempted regulation by class is distinguishable from many regulations which are completely proper under the police powers of government – such as signs of "No parking at any time," "No parking 8:00 a.m. to 5:00 p.m.", and no parking in front of fire plugs, fire and police stations, etc. This defendant is a businessman in the area and benefits are being given to a residential class of persons but not to him or persons in any other category, and this must be considered special class legislation. Public streets are for the use of all people, and I am not aware of any absolute right given one to park in front of his home.

While I am in entire sympathy with the residents in their plight in this heavily concentrated area, I am called upon to rationalize that the County can act as they have within the framework of the Fourteenth Amendment to our Constitution. The problem simply put is whether or not the use of public streets is for use by motorists in general wherever they live or work, or whether a certain class of motorists may be favored because they happen to reside along a public street – this at the expense of those who live elsewhere and who, incidentally, also have problems.

I recognize that I am a strict constructionist of the Constitution, but I do not believe that even today we can bend our Fourteenth Amendment to sustain this type of discrimination between two classes of owners of motor vehicles.

/s/ Ralph G. Shure

Ralph G. Shure, Chief Judge

Supreme Court, U. S.
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MAY 3 1977
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1418

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, *et al.*,

Petitioners,

v.

RUDOLPH A. RICHARDS, RAY ELBERT PARKER, *et al.*,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT RAY ELBERT PARKER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 217 Va. ____, 231 S.E.2d 231.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on January 14, 1977. This Court has jurisdiction pursuant to 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether Arlington County, Virginia, can delegate public powers conferred upon the municipality to private property owners with intent to divide the citizenry on the basis of property as a pretext for unequal and exclusive rights of one class of citizens over the rights of another class of citizens through a Parking Permit Ordinance delegating police power to inhibit constitutional rights under threat of punishment, state action and a set of rules not operating alike on all citizens of the Commonwealth of Virginia?

STATUTES AND CONSTITUTION PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the law.*"

42 U.S.C. §1983 provides,

> "Every person who, *under color of any statute, or Ordinance*, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or im-

> munities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 28 U.S.C. §1343.

Section 29.D of the Zoning Ordinance of Arlington County, Virginia, provides in pertinent part:

> ". . . The County Manager shall cause appropriate signs giving notice of the prohibition to be posted in those streets restricting all parking except parking by the holders of permits to be granted *only* under the following conditions:
>
> a. To persons who are *residents* . . . restricted for every vehicle owned by those persons and registered in the County.
>
> b. To persons who are *visitors* of any residents . . . to be valid for a stated period but no more than thirty days. . . .
>
> c. To *persons who do business* with any resident. . . .
>
> d. No permit issued hereunder shall be valid for more than one year, but may be renewed upon expiration . . . it shall be unlawful for any person to violate such rules and regulations."

United States Constitution, Article 1 §8.

United States Constitution, Article IV §2.

Virginia Constitution §§1, 3, 4, 11, 15.

STATEMENT OF THE CASE

On or about May 2, 1974, Petitioners, reacting to political, business and community pressure groups during an election year, submitted to the Arlington County Board a plan for the establishment of a permit parking scheme which would give the property owners of South Arlington County, Virginia, exclusive privileges

denied to other citizens of the County and to all other citizens of the Commonwealth of Virginia. The recommended permit parking plan required governmental action by and through the Petitioners' herein, their agents, servants and employees.

The purpose of the bill was to radically alter the patterns of residential street parking in congested urban areas. The bill permitted Arlington County, Virginia to issue permits for motor vehicles parking on public streets and made distinctions between outside people and residents in that it did not operate alike on all persons and property under the same circumstances. The point of the bill was to allow Arlington County to mark off certain areas and to guarantee parking spaces for residents who live in those areas that are flooded daily by outside parkers, while restricting the public use and enjoyment of the way for non-residents; further, there was nothing in the bill to prevent or discourage the County from requiring permits to restrict movement for every possible public street parking space in Arlington County, Virginia.

Arlington County, Virginia was the first community in the United States to implement such a law and devise a permit parking plan for a residential neighborhood for the sole purpose of excluding a select and well-defined group of citizens from parking in a public residential area. The Petitioners' saw the need based on political considerations for such permits and moved to enact an Ordinance which would restrict parking by blocks, setting off permit spaces equal to the number of houses on each block and giving block residents "exclusive rights" to permits for their cars and conferring upon the residents a "proprietory" interest in the public street, while at the same time denying the permits to non-residents (including residents from other parts of Arlington County).

On or about May 18, 1974, the Arlington County Board passed a motion authorizing and directing Petitioners', acting by and through their agents, servants and employees of Arlington County, to proceed with the implementation of the aforesaid permit parking plan in the designated pilot residential zone in accordance with Section 29-D of the Zoning Ordinance of Arlington County, Virginia. The only persons eligible for parking permits were property owners, their visitors and persons with whom they do business.

The permit parking plan provided that each household unit in the designated pilot area would be given, free of charge, permit stickers to be placed upon each and every motor vehicle owned by those persons and registered with the County. Possession of such a parking permit sticker enabled the motor vehicle displaying the orange sticker to be parked upon the public streets in the aforesaid area each day for one year without violating the law. This parking permit could be renewed by the same property owner each year or in the alternative by any new owner acquiring the property through sale, purchase or other legal means. In addition, the property owner could obtain, free of charge, thirty-day permits for persons visiting or doing business with the property owner. These permits could be renewed only by the property owner at the end of each month.

The Ordinance made it unlawful and punishable, by law, to park any vehicle in a designated area without a valid permit. All citizens not possessing such a permit sticker were subject to charges of a misdemeanor, or criminal prosecution, if such citizen used the said public streets for parking a vehicle during the prohibited times. Of the said selected residential areas and residences, most had driveways which permitted off-street parking.

Respondent, RAY ELBERT PARKER, and others similarly situated, were employed in Crystal City, Virginia and filed two Bills of Complaint in two separate cases which were consolidated for trial purposes. The respondents asked for a declaration that the Ordinance both on its face and in its application to each of them was unconstitutional.

After extensive trial and argument, the Circuit Court for Arlington County, Virginia in its Order of June 18, 1975 found the Ordinance to be in violation of both the Constitution of the Commonwealth of Virginia and the Constitution of the United States. The Supreme Court of Virginia affirmed the lower court in a six-judge per curiam decision on January 14, 1977.

REASONS FOR DENYING THE WRIT

I.

WHETHER ARLINGTON COUNTY, VIRGINIA, CAN DELEGATE PUBLIC POWERS CONFERRED UPON THE MUNICIPALITY TO PRIVATE PROPERTY OWNERS WITH INTENT TO DIVIDE THE CITIZENRY ON THE BASIS OF PROPERTY AS A PRETEXT FOR UNEQUAL AND EXCLUSIVE RIGHTS OF ONE CLASS OF CITIZENS OVER THE RIGHTS OF ANOTHER CLASS OF CITIZENS THROUGH A PARKING PERMIT ORDINANCE DELEGATING POLICE POWER TO INHIBIT CONSTITUTIONAL RIGHTS UNDER THREAT OF PUNISHMENT, STATE ACTION AND A SET OF RULES NOT OPERATING ALIKE ON ALL CITIZENS OF THE COMMONWEALTH OF VIRGINIA.

The law of the Commonwealth of Virginia does not delegate or vest Arlington County Boards with power to inhibit constitutional rights without according other citizens of the Commonwealth of Virginia the opportunity to enjoy the same privileges and benefits. *State v. Whisman*, 263 N.E.2d 411 (Ohio, 1970); *Cincinnati v. Cook*, 107 Ohio St. 223.

A government employee commuting to work is forced to observe one set of rules under terms of the Ordinance not required of others since the Arlington County Ordinance provides residential parking convenience for homeowners at the expense of parkers. The lower courts found this to be a denial of due process, equal protection and a law that was in effect a "special" law and intentional exercise of legislative power to confer special privileges upon a particular class of citizens or in the alternative a law that was intended to impose special restrictions and burdens upon particular persons or localities to the exclusion of other persons or localities similarly situated. Likewise, the Arlington County law violates the Interstate Commerce Act since it allows the County to reach beyond its own border to bar transportation of persons *across* its boundaries as well as to bar transportation of persons *within* its boundaries.

It is asserted that the protection of the right to travel and movement is a *civil right* subject to judicial review where public facilities are dedicated to private persons for the sole purpose of excluding a particular individual or group of citizens traveling. The right of travel implies by its very nature the right to arrive at one's destination. Indeed, the right of travel of government employees using public facilities may not be lawfully conditioned upon relinquishing constitutional rights as a prerequisite to employment in Arlington County, Virginia. *Thompson v. Smith*, 155 VA. 367, pp. 377, 386.

Under the Ordinance, the property owner in South Arlington, Virginia, has a right superior to that of any other citizen of the Commonwealth of Virginia in the use of the public street by granting of a parking right to the residents in contravention of the well-established

rights of the general public of which respondent is a member.

The Ordinance in effect gives a home owner a "proprietory" interest in the public street fronting his home. This is not a valid exercise of the police power to control streets and regulate traffic thereon. There is no taking from the owner of property the rights of "ingress" and "egress" to their premises, but rather the conferring upon the home owner of a proprietory interest in the street, which he may transfer to whomsoever he may choose (sale, will, etc.) and such rights enforced by the provision of the ordinance.

The principle involved is fundamental and of universal application, namely, that public powers conferred upon a municipality cannot be delegated to private property owners. *Town of Leesburg v. Tavenner*, 196 VA. 80 (1954), 85, 84-85; *Thompson v. Smith*, 155 VA 367, 379 (1930); *Kaufman v. West, et al.*, 233 Pacific 321 (Sup. Ct. Washington, 1925). The permit parking plan in effect in Arlington County demonstrates an intentional exercise of legislative power to confer special privileges and immunities or in the alternative special restrictions and burdens upon particular persons or localities to the exclusion of other persons or localities similarly situated. Therefore, the law does not generally apply to all persons and property in a uniform manner. *Farmer v. Christian*, 154 VA 48 (1930); 42 U.S.C. §1983.

An Ordinance cannot "unreasonably" restrict the public use and enjoyment of the streets. Indeed, to allow this madness would be the first step toward a "permit" society. It is, therefore, not what the Arlington County law includes that makes it special, but rather what it excludes.

WHEREFORE, Respondent, RAY ELBERT PARKER, respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument or review, and Respondent respectfully moves the Court to dismiss the appeal or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Virginia on January 14, 1977.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 76-1418

In the Supreme Court of the United States

OCTOBER TERM, 1976

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL., PETITIONERS

v.

RUDOLPH A. RICHARDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether an ordinance excluding certain non-residents from parking on the streets of residential neighborhoods violates the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

Congress concluded in Section 1 of the Clean Air Act that "the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare." 42 U.S.C. 1857(a)(2). Congress decided that air pollution should be abated and authorized the Environmental Protection Agency to coordinate the national effort, but it

recognized "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." 42 U.S.C. 1857(a)(3); see generally *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63.

The primary tool for the control of air pollution is the implementation plan each State must prepare and enforce. See 42 U.S.C. 1857c-5(a)(1). States and their subdivisions select the mix of measures to control pollution that they deem most desirable in light of the costs and benefits of each method. The Environmental Protection Agency has suggested to the States that strategies to reduce the number of vehicle miles traveled may be especially useful ways to reduce pollution, and that limitations on parking may be especially useful ways to reduce the number of vehicle miles traveled (38 Fed. Reg. 30629).[1]

The ordinance at issue in this case arose out of the quest to reduce air pollution emitted from automobiles. The State of Virginia promulgated a plan that recognized the importance of reducing vehicle miles traveled; it left to local jurisdictions the task of selecting devices (38 Fed. Reg. 33702, 33706-33707), and Arlington County adopted an ordinance restricting non-resident parking as a tool to reduce vehicle miles traveled. The ordinance was enacted on May 18, 1974, and submitted to the Environmental Protection Agency for approval;[2] the Agency approved the

---

[1]See also 38 Fed. Reg. 16551, 16552, and the Environmental Protection Agency's August 1973 "White Paper" on the problems of control of pollution by vehicles.

[2]The ordinance appears at Pet. App. 24a-28a. Under the ordinance the right of non-resident commuters to park their cars in residential neighborhoods during business hours may be curtailed when the County Manager determines that more than 75 percent of the onstreet parking capacity is in use and that more than 25 percent of the capacity is used by non-residents whose destination is an industrial or commercial area adjoining the residential neighborhood. See also Pet. 3-5.

ordinance on November 18, 1974, as "a reasoned approach to address, among other community needs, degrading air quality due to excessive commuter parking" (Pet. App. 29a).[3]

The decision of the Supreme Court of Virginia invalidating this aspect of the pollution control strategy on federal constitutional grounds would affect the ability of States and localities to meet the goals established by Congress in the Clean Air Amendments of 1970. If the decision below is correct, they must devise other strategies that would effectively control pollution, or the United States must devise broader strategies. The United States therefore has a significant interest in the question presented by this case.

DISCUSSION

1. The Supreme Court of Virginia has held that a local ordinance limiting the circumstances under which non-residents may park on the streets of residential neighborhoods violates on its face the Equal Protection Clause of the Fourteenth Amendment.[4] If the decision below is allowed to stand, the State and its subdivisions will be required to find new pollution control strategies, and the new strategies may be more costly or more disruptive than was the restriction on non-resident parking.

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[3]Because the ordinance was voluntarily enacted, this case is not affected by *Maryland* v. *Environmental Protection Agency*, 530 F. 2d 215 (C.A. 4), and *District of Columbia* v. *Train*, 521 F. 2d 971 (C.A. D.C.), vacated *sub nom. Environmental Protection Agency* v. *Brown*, No. 75-909, May 2, 1977, which dealt with the extent to which the Agency could require unwilling States to enforce a pollution control plan that had been promulgated by the Agency.

[4]The court declined to consider record evidence offered in support of the statute. See Pet. App. 4a-5a.

Numerous plans prepared to implement the Clean Air Amendments of 1970 include restrictions on parking, and these restrictions have been upheld by at least two courts of appeals. *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F. 2d 646, 671-676 (C.A. 1); *Friends of the Earth* v. *Environmental Protection Agency*, 499 F. 2d 1118, 1125 (C.A. 2). The Supreme Judicial Court of Massachusetts also has upheld a ban on nonresident parking. *Commonwealth* v. *Petralia*, No. M-729, decided April 29, 1977.[5] On the other hand, several state courts have held restrictions on non-resident parking to be unconstitutional,[6] and the constitutionality of such restrictions is being challenged elsewhere.[7] A conflict between the highest courts of two States already exists, and the problem is such that further litigation in the lower courts is unlikely either to assist this Court in deciding the issue or to obviate the need for that decision.

2. The United States believes that restrictions on the availability of parking can be an important part of a program to reduce pollution. A restriction upon parking by non-residents, such as that at issue here, reduces pollution because it deters non-residents from using cars to commute into the area.

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[5]For the convenience of the Court, we have reprinted *Petralia* as an Appendix to this memorandum.

[6]See *State* v. *Whisman*, 24 Ohio Misc. 59, 263 N.E. 2d 411 (citing earlier decisions).

[7]See, *e.g.*, *Georgetown Association of Businessmen* v. *District of Columbia*, D.C. Super. Ct., Civ. No. 7242-76, decided August 9, 1976 (preliminarily enjoining a restriction on non-resident parking); *State* v. *Thompson*, Md. Cir. Ct., Crim. No. 19018, decided March 16, 1977. See also Pet. 18-19.

Any program to reduce pollution, including restrictions on non-resident parking, imposes hardships on those who must alter their behavior, but the existence of such hardships is inevitable. *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246 (pollution control, which benefits the general public, may be achieved by requiring particular factories to clean up or close down). Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (particular mine operators may be required to recompense miners for damage caused by coal dust inhalation).

The Supreme Court of Virginia offered several reasons for its conclusion that the restriction upon non-resident parking violates the Equal Protection Clause of the Fourteenth Amendment. It stated that the ordinance discriminates in favor of neighborhood residents (Pet. App. 7a), that it is irrational to favor residents over non-residents in designing public programs (*id.* at 9a-10a), that it is improper to give residents "a parking monopoly in the public streets of their neighborhood" (*id.* at 9a), and that although a statute favoring residents over non-residents may reduce the amount of pollution, "solutions achieved at the price of invidious discrimination are too dear" (*id.* at 12a). Each of these grounds is inconsistent with decisions of this Court.

a. The Supreme Court of Virginia's apparent conclusion that statutes distinguishing between residents and non-residents of a particular location are irrational conflicts with *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645, and *Detroit Police Officers Association* v. *City of Detroit*, 405 U.S. 950, dismissing for want of a substantial federal question an appeal from 385 Mich. 519, 190 N.W. 2d 97. *McCarthy* and *Detroit* each involved a local statute requiring certain municipal employees

to be *bona fide* residents of the city; in each case non-residents attacked the statute as irrational and discriminatory; in each case this Court upheld the statute. In *McCarthy* the Court concluded (424 U.S. at 646) that "[w]e have • • • held that this kind of ordinance is not irrational." The Court also rejected the argument that a requirement of *bona fide* residence impinged upon the right of interstate travel. *Detroit* and *McCarthy* establish that statutes preferring residents over non-residents are not irrational.

b. To the extent that the Supreme Court of Virginia relied upon the argument that the grant to neighborhood residents of a "monopoly" over that neighborhood's parking space offends the Equal Protection Clause, its rationale is inconsistent with *City of New Orleans* v. *Dukes*, 427 U.S. 297. *Dukes* sustained, against an equal protection challenge, a New Orleans ordinance that created a monopoly of hot dog vending in the French Quarter of the City. The Court rejected the argument that the City's desire to preserve the appearance and attractiveness of the Quarter was an insufficient reason to exclude other hot dog vendors, and it explained, in language equally appropriate to the present case (427 U.S. at 303-304):

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. • • • Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. • • • [T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines • • •; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

See also *Dandridge* v. *Williams*, 397 U.S. 471, 485-486; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488.

The Supreme Court of Virginia did not find, nor could it have found, that the restriction upon non-resident parking is a "wholly arbitrary act" or that it affects fundamental personal rights.[5] The ordinance is rationally related to the goals, recited in its preamble (Pet. App. 25a), to "protect [the neighborhoods] from polluted air, excessive noise, and trash and refuse caused by the entry of [non-residents'] vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; • • • and to preserve the safety of children and other pedestrians • • •." These goals, which are undoubtedly advanced by the parking restrictions, are at least as pressing as the goals deemed sufficient in *Dukes* to justify the creation of a hot dog monopoly.

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[5]States traditionally have had broad powers to make rules concerning the use of the public streets and the right to drive upon them. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 523; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 783. Use of a car is not a fundamental right. See *Dixon* v. *Love*, No. 75-1313, decided May 16, 1977, slip op. 7-8.

c. The state court appeared to concede that the ordinance has legitimate goals (Pet. App. 7a) and is rationally related to these goals, but it concluded that the burdens imposed upon non-residents in the course of achieving those goals made the price "too dear" (*id.* at 12a). Such judicial re-evaluation of the legislative judgment is inconsistent with *Village of Belle Terre* v. *Boraas*, 416 U.S. 1. *Boraas* upheld a zoning ordinance that excluded from the Village certain groups of unrelated persons that were thought to contribute to overcrowded conditions. The non-residents who sought admission to the Village contended that the ordinance was unfair and did not achieve goals sufficiently important to justify the imposition on association that the ordinance created, but this Court concluded that such value judgments are a proper matter of legislative discretion. It explained (416 U.S. at 9) that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. • • • The police power • • • is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

The Arlington ordinance involved in the present case serves values no less important than those at stake in *Boraas*. The burden of the Arlington ordinance is much less; the Arlington ordinance excludes cars, not people, and persons desiring to commute to work can do so by using public transportation or finding other places to park. Whether the ordinance exacts a price "too dear" in relation to its objectives is a legislative, not a judicial, judgment, and it is immaterial that the benefits of the ordinance may not have been established to the court's satisfaction. *Whalen* v. *Roe*, No. 75-839, decided February 22, 1977, slip op. 6-9. The restriction on non-resident parking is rationally related to a permissible goal of legislation, and it does not impinge

on fundamental personal rights or draw suspect distinctions. Indeed, it is not a classification of people at all. It distinguishes only between consequences attached to different categories of activities. Persons who live in a few designated neighborhoods may park there; most persons who do not, may not. This is ordinary police legislation attaching particular consequences to decisions persons may make about where to reside, and it does not violate the Equal Protection Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.[9]

Respectfully submitted.

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MAY 1977.

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[9]Because the decision of the Supreme Court of Virginia so clearly conflicts with the governing equal protection principles, this Court may wish to consider summary reversal.

DOJ-1977-05

APPENDIX

April 29, 1977
No. M-729

S.J.C.

COMMONWEALTH *vs.* GUY A. PETRALIA

(and three companion cases[1]).

WILKINS, J. The defendant, who has been charged with a parking violation in Cambridge, challenges the constitutionality of the regulation of the city's traffic director under which he was charged.[2] He challenges the regulation because it permits only authorized residents of Cambridge to park their automobiles on the public street where he, a nonresident, parked his automobile. We conclude that the classification made by the regulation bears a rational relation to proper legislative objectives.

The case is before us on a report which contains all the material facts. We transferred the case to this court on our own motion. Before considering the specific questions reported to us, we shall set forth the necessary background.

On May 6, 1975, a complaint issued charging the defendant with parking on Spring Street in East Cambridge, in a residential zone near the court house complex, in violation of a regulation of the traffic director. Spring Street was posted with signs reading "PARKING BY PERMIT ONLY EX SUN." The defendant had no permit

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[1]Two of the companion cases are by the Commonwealth against Mr. Allan A. Fishman and one is by the Commonwealth against Mr. Joseph H. Porter. Mr. Petralia is the only defendant who has filed a brief with this court. We shall refer to him as the defendant. All three are members of the bar of the Commonwealth.

[2]Statute 1961, c. 455, as amended through St. 1972, c. 340, authorizes the adoption of traffic regulations in Cambridge.

and, as a non-resident of Cambridge, was not entitled to obtain one under the traffic director's "Rules and Regulations for the Resident Parking Sticker Program." A permit could be obtained by any resident of Cambridge for an automobile registered in Massachusetts, principally garaged in Cambridge, and owned or used by that resident.

On May 14, 1975, the defendant pleaded not guilty in the Third District Court of Eastern Middlesex. He was found guilty, fined $10, and appealed to the Superior Court. The defendant filed a motion to dismiss in the Superior Court, alleging various grounds for the motion.[3] Mr. Porter joined in the defendant's motion; Mr. Fishman filed a motion to dismiss which did not allege any grounds. The judge sitting in the Superior Court concluded that the motions raised "questions of law which are both doubtful and important" which required a decision of this court and reported the cases in pursuance of G. L. c. 278, § 30A.[4]

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[3]The motion to dismiss alleged that the parking regulation was unconstitutional as (a) a denial of equal protection of the laws, (b) an interrference "with the fundamental right of all people to travel uninhibited," (c) a denial to nonresidents of free and equal use of the public streets, (d) a denial to nonresidents of unrestricted access to the courts of Middlesex County in Cambridge, (e) a denial of the privileges and immunities of citizenship enjoyed by the residents of Cambridge, (f) being void for vagueness, (g) an interference with commerce, and (h) constituting an indirect tax on nonresidents for use of public streets.

[4]General Laws c. 278, § 30A, inserted by St. 1954, c. 528, provides for an interlocutory report in a criminal case of a question or questions of law which the judge regards "so important or doubtful as to require the decision of . . . [this court] thereon before trial, in the interest of justice." The entire case is not to be reported but only so much of it as is "necessary to present the question of law." Although G. L. c. 278, § 30A, provides for reporting of such a question to this court, the report properly was entered initially in the Appeals Court. See G. L. c. 211A, § 10.

As to Mr. Porter and Mr. Fishman, we do not consider the questions reported because neither has filed a brief in this court nor joined in Mr. Petralia's brief. See Mass. R. A. P. 16 (j), 365 Mass. 860 (1974). Therefore, each has waived his right to rely on the contentions which prompted the judge's reported questions. *Carangias* v. *Market Men's Relief Ass'n*, 293 Mass. 284, 285 (1936). These defendants have no right to answers from this court, and it makes no difference that the judge reported the case without decision. *Soscia* v. *Soscia*, 310 Mass. 418, 422-423 (1941). See *Commonwealth* v. *Eppich*, 304 Mass. 678 (1939).

As to the defendant, we consider the questions reported, which are set forth in the margin,[5] only in so far as they have been argued in his brief. The remaining questions need not be considered because, by not arguing them, the defendant has waived them as a basis for his motion to dismiss. Mass. R. A. P. 16(a)(4), as amended, Mass. (1975). The only argument now made by the defendant is that the parking

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[5]The judge stated that "[t]he questions requiring decision are as follows:

"a. Is Chapter 455, Acts of 1961, as amended by Chapter 340, Acts of 1972, constitutional?

"b. Is Chapter 455, Acts of 1961, as amended by Chapter 340, Acts of 1972, constitutional, as applied to these defendants?

"c. Is Chapter 455, Acts of 1961, as amended by Chapter 340, Acts of 1972, either on its face or as applied to these defendants, invalid for any reason stated in the Defendants' Motions to Dismiss?

"d. Are Cambridge Traffic Regulations implementing a resident-only parking system, adopted pursuant to Chapter 455, as amended by Chapter 340, Acts of 1972, constitutional as applied to the defendants?

"e. Should the Defendants' Motions to Dismiss be granted or should an order issue that the defendants be brought to trial forthwith, or should some other appropriate disposition be made?"

regulation discriminates against him as a non-resident in violation of his right to equal protection of the laws.[6]

The basic question is whether the classification made by the regulation rationally furthers a legitimate State purpose. *Opinion of the Justice*, Mass., (1975).[a] *Commonwealth* v. *Henry's Drywall Co.* 366 Mass. 539, 541-543, 544-546.[b] *Pinnick* v. *Cleary*, 360 Mass. 1, 27-28 (1971). *New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976). *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8-9 (1974). Our analysis is no different because the challenged governmental action is based on a regulation, enacted pursuant to statutory authority, rather than based directly on a statute. See *Colella* v. *State Racing Comm'n*, 360 Mass. 152, 155-156 (1971); *Commonwealth* v. *Berney*, 353 Mass. 571, 574 (1968) (ordinance banning

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[6]The defendant does not challenge the regulation as exceeding the traffic director's statutory authority. Statute 1972, c. 340, amended cl. (*a*) of § 3 of St. 1961, c. 455, to authorize an exception from parking prohibitions in specified residential areas for certain vehicles of certain residents of Cambridge.

We are not presented with the question whether the regulation went beyond the statutory authorization by making stickers available to each resident of Cambridge owning or using an automoble principally garaged in Cambridge. The 1972 statutory amendment (St. 1972, c. 340) appears literally to authorize stickers only for persons residing in a specified residential area where parking is authorized by permit only. We have been advised that in 1974 a judge of the Third District of Eastern Middlesex ruled that a regulation which did not authorize all city residents to obtain a sticker discriminated impermissibly among Cambridge residents in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. That judge indicated that a parking permit program available to all Cambridge residents would be valid. The traffic director apparently thereafter altered the parking sticker program to make stickers available to all residents of Cambridge who owned vehicles principally garaged in Cambridge.

[a]Mass. Adv. Sh. (1975) 2637, 2642.

[b]Mass. Adv. Sh. (1974) 2377, 2380-2382, 2385-2386.

overnight parking); *Commonwealth* v. *Dobbins*, 344 Mass. 272, 275 (1962) (parking ordinance); *Commonwealth* v. *Sargent*, 330 Mass. 690, 692 (1953) (Boston parking regulation exempting only members and officers of the General Court upheld against an equai protection of the laws challenge). The defendant rightly concedes that the regulation of the use and operation of vehicles on public ways, including parking, is a legitimate subject of State concern. *Commonwealth* v. *Dobbins*, *supra* at 275, and cases cited. *Opinion of the Justices*, 297 Mass. 559, 563-564, 566 (1937). The Commonwealth's right to regulate vehicles stopping on a public way existed even before the invention of the motor vehicle. See *Commonwealth* v. *Rowe*, 141 Mass. 79, 80 (1886) (a cab); *Commonwealth* v. *Fenton*, 139 Mass. 195, 197 (1885) (a wagon). In addition, the reduction of traffic congestion and air pollution and the encouragement of the use of public transportation are legitimate State purposes. See *Radcliffe College* v. *Cambridge*, 350 Mass. 613, 617 & n. 4 (1966); *Cabot* v. *Assessors of Boston*, 335 Mass. 53, 58, 64 (1956); *Lowell* v. *Boston*, 322 Mass. 709, 737 (1948); *Commonwealth* v. *Newhall*, 205 Mass. 344, 347-348 (1910); *South Terminal Corp* v. *EPA*, 504 F. 2d 646, 671-673 (1st Cir. 1974); *Friends of the Earth* v. *EPA*, 499 F. 2d 1118, 1125 (2d Cir. 1974). See also Verbit, The Urban Transportion Problem, 124 U. Pa. L. Rev. 368, 390397 (1975); Note, A Cure for the Highway Epidemic: A Balanced Subsidy, 5 Suffolk U.L. Rev. 902, 912-914 (1971).

The private motor vehicle, especially one occupied by only one person, often contributes unreasonably to congestion on the highways, to pollution of the environment, and to the uneconomic expenditure of natural resources. The East Cambridge restricted parking area is within reasonable walking distance of the various court and other public facilities in East Cambridge. It is also within reasonable walking distance of the Lechmere Square

subway station and of various bus stops of the Massachusetts Bay Transportation Authority. We take judicial notice that the court and other public facilities are accessible by public transportation and that the general vicinity in East Cambridge is developed substantially and intensely with commercial and industrial uses as well as with residential uses.

We think that a regulation which discourages persons from driving their automobiles to the congested neighborhood in the vicinity of the court house and other public facilities in East Cambridge deals rationally with the public interest in reducing highway congestion, in reducing air pollution, and in encouraging the use of public transportation in place of private transportation.

We turn then to the question whether the Cambridge parking regulation's distinction between Cambridge residents who have obtained parking permits and all others rationally furthers one or more of these legitimate State interests. The defendant relies on three opinions from other jurisdictions holding that parking restrictions which discriminated in particular ways between residents of an area and others were unconstitutional. *State* v. *Whisman*, 24 Ohio Misc. 59, 64-65 (C.P. Scioto County, 1970). *Cincinnati* v. *Cook*, 107 Ohio St. 223, 226-227 (1923). *Kaufman* v. *West*, 133 Wash. 192, 193 (1925). The *Whisman* case involved an ordinance whose purpose was limited to assuring parking rights to authorized residents of an area before others could park on public ways in that area. The court did not consider the broader purposes of the type which lie behind the Cambridge regulation. The *Cook* case was decided on the ground that there was an unconstitutional delegation to property owners of the right to determine who could park in front of their premises. The *Kaufman* case was decided on State constitutional grounds

only, and concerned an ordinance which discriminated against apartment house dwellers. The expressed purpose of the ordinance was a limited one. None of these opinions describes the character of the area where the parking restriction applied. These cases are inapplicable to the case before us, which involves a congested urban area which has substantial traffic and parking problems for years.

The Supreme Court of Virginia recently struck down on equal protection grounds a local zoning ordinance which authorized residents of a defined zone, their guests, and invitees to park their motor vehicles in that zone but barred all others from parking there. *County Bd. of Arlington County* v. *Richards*, Va. (1977).[c] The ordinances' declared purposes were to protect the zone and its residents. Those purposes were not founded, if they could have been under State law, on the impact of non-resident parking on regional considerations, such as traffic congestion, air pollution, and the encouragement of the use of public transportation. The opinion accordingly gives no consideration to the possibility that a parking regulation, seemingly favoring residents of an area, might be justified on broader considerations than those expressed by the local board.

We conclude that the placing of motor vehicles of residents of Cambridge in a category apart from all other motor vehicles is not irrational. See *Opinion of the Justices*, 341 Mass. 760, 781 (1960). Those Cambridge residents most interested in parking in the restricted area are those who live in it. If they leave their cars parked near their homes, they contribute nothing to air pollution or to the congestion of moving traffic on the highways. In general, those Cambridge residents who do not live in the restricted area but are

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[c] 231 S. E. 2d 231, 235 (Va. 1977).

permitted to park in it have a shorter distance to travel and will contribute less to traffic congestion and pollution than will persons driving to the restricted area from other municipalities. Legislative classifications need not be perfect in order to survive a challenge on equal protection grounds. *Keough* v. *Director of the Div. of Employment Security*, Mass. (1976).[d] *Opinion of the Justices*, Mass., (1975).[e] *Milton* v. *Civil Serv. Comm'n*, 365 Mass. 368, 377 (1974). *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). The defendant has failed to meet his heavy burden of proving that the classification made by the Cambridge traffic director is invidiously discriminatory.[7]

The discrimination made by the Cambridge regulation is based rationally on the use or nonuse of a motor vehicle. A resident who parks near his home is not using his automobile, whereas a person who parks in an area away from his home has used his vehicle and thus has contributed to the problems which the Cambridge regulation seeks to address. The rational distinction made by the Cambridge regulation is founded on vehicle use. Place of residence is merely a reasonable means of measuring that use.

We answer question d, concerning the constitutionality of the regulation, in the affirmative, passing only on the constitutional issue argued by the defendant. Questions a, b,

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[d]Mass. Adv. Sh. (1976) 810, 816.

[e]Mass. Adv. Sh. (1975) 2521, 2542-2543.

[7]We add that, if the regulation were constitutionally invalid for favoring residents of Cambridge who do not live in the East Cambridge restricted parking area in preference to non-residents, the appropriate judicial remedy might be to deny parking rights to such residents of Cambridge as well as to the defendant. Such a solution would achieve the purpose of the regulation better than granting parking rights to everyone by striking down the regulation in its entirety.

and c, all of which deal with the constitutionality of St. 1961, c. 455, as amended through St. 1972, c. 340, need not be answered because the defendant has not challenged the legislation as such. Question e asks what course the judge should follow. That question does not present a question of law, and we do not answer it. The report is dismissed as to the defendants Mr. Porter and Mr. Fishman. In the discretion of the judge, their motions to dismiss are to be treated as waived.

So ordered.

Supreme Court, U. S.
FILED
MAY 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1418

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Petitioners,

v.

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Respondents.

BRIEF OF AMICUS CURIAE MONTGOMERY COUNTY, MARYLAND In Support of PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479,
30 L.Ed. 2d 502 (1971) 9

Seaboard Air Line R.R. v. Seegers, 207 U.S. 73, 28 S.Ct. 28,
52 L.Ed. 108 (1907) 7

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322,
22 L.Ed. 2d 600 (1969) 13

Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57,
74 L.Ed. 211 (1029) 10

Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581,
76 L.Ed. 1167 (1932) 10

Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536,
39 L.Ed. 2d 797 (1974) 12, 13, 14

Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5,
21 L.Ed. 2d 24 (1968) 9

Williamson v. Lee Optical Co., 348 U.S. 483,
75 S.Ct. 461, 99 L.Ed. 563 (1955) 9

Young v. American Mini Theatres, Inc., 427 U.S. 50,
96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976) 14

Positive Law:

U.S. Constitution, Fourteenth Amendment, Sec. 1 ..... *passim*

28 U.S.C. §1257 (3) 1

42 U.S.C. §1857 16

Zoning Ordinance of Arlington County, Virginia ..... *passim*

Regulations:

38 Fed. Reg. 30626, 30629 (1973) 16

38 Fed. Reg. 16556 (1973) 16

OPINIONS BELOW

The opinion of the Supreme Court of Virginia, rendered on January 14, 1977, is reported at 217, Va.____, 231 S.E.2d 231. (Appendix A)[1] The unreported letter opinion rendered by the Circuit Court of Arlington County on June 18, 1975, appears as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on January 14, 1977, (Appendix C). This Court has jurisdiction by virtue of 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Does a municipal ordinance which restricts, during certain time periods, on-street parking by non-residents in residential neighborhoods congested by commuter parking violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when similar restrictions do not apply to residents of those neighborhoods?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1 . . .No State shall deny any person within its jurisdiction the equal protection of the laws."

SECTION 29.D of the Zoning Ordinance of Arlington County, Virginia, entitled "Restriction on Parking in Districts in Which Commercial and Industrial Uses Are Not Permitted," is set forth in its entirety in Appendix D.

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1. Except as otherwise indicated, appendix designations refer to the Appendix to Arlington County's Petition for a Writ of Certiorari filed with this Court.

INTEREST OF AMICUS

Amicus Curiae Montgomery County, Maryland, is a sister jurisdiction of Arlington County, Virginia, located within the Metropolitan Area of Washington, D.C. Montgomery County has approximately 590,000 residents and is 504 square miles in size. Like Arlington County, Montgomery County contains within its boundaries numerous urban areas in which intensified commercial and industrial uses have grown up adjacent to or close by older well-established residential neighborhoods. The resultant impact in terms of traffic and parking congestion, air, noise and litter pollution, and the general adverse effect on the health, safety and welfare of its residential members of the community have become an increasing concern to the citizens and government of Montgomery County.

In 1974, after lengthy study, the Montgomery County Council adopted and the County Executive later implemented a residential parking permit ordinance which, although somewhat different in procedural aspects, has the same general effect as the Arlington County ordinance.[2] It too differentiates to some degree between residential and non-residential parking and authorizes certain restrictions on the latter. Like the Arlington County ordinance, the Montgomery County law was enacted in an effort to safeguard the health, safety and welfare of the County's citizens, to combat adverse environmental conditions in the County, and to preserve and protect the residential character of neighborhoods heavily congested by non-residential commuter parking. As was the case with the Arlington County ordinance, the Montgomery County perking permit program served, among other things, as part of a coordinated effort of the several jurisdictions in the Metropolitan Area of Washington, D.C. to respond to the expanding environmental problems causes by commuter automobile travel.

Recently, in an action before the Circuit Court of Montgomery County, Maryland, the County's residential parking permit ordinance was declared to create an unreasonable classification in violation of the Fourteenth Amendment.[3] This matter is presently on appeal before the Court of Special Appeals

2. See Appendix to this brief.

3. State v. Thompson, Criminal No. 19018, March 16, 1977.

of Maryland.[4] Unless this Court upholds the Arlington County ordinance and the residential parking permit concept represented thereby, Montgomery County and other jurisdictions throughout the country which have adopted or are contemplating the adoption of similar ordinances in order to alleviate environmental problems and to protect the safety and character of their residential neighborhoods will be powerless to address these goals in a meaningful way. Not only will jurisdictions be unable to deal with their own internal problems, but cooperative efforts among various government entities to relieve the increasing burdens created by commuter vehicular traffic will be to no avail. Accordingly, Montgomery County has a compelling interest in seeing that the Arlington County ordinance is sustained and that the decision of the Supreme Court of Virginia challenging that ordinance as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is reversed.

This brief is being submitted in accordance with Paragraph 4 of Rule 42 of this Court. It is submitted by special counsel retained by the County Attorney for Montgomery County, the authorized law officer of that jurisdiction.

STATEMENT OF THE CASE

At issue in this case is the constitutionality under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution of a municipal ordinance enacted by the County Board of Arlington County, Virginia, authorizing certain restrictions to be placed on commuter parking in residential areas of the County. (Appendix D) Under the Arlington County ordinance the County Manager is responsible for determining when more than 75 percent of the available on-street parking capacity in a particular residential neighborhood is used. The County Manager must then determine when more than 25 percent of the utilized on-street spaces are occupied by vehicles the operators of which are destined for commercial or industrial areas and not for

4. Appeal noted April 12, 1977.

the particular residential area in question. When both conditions have been met the County Manager is authorized to restrict parking in the residential area during certain time periods to holders of valid parking permits as well as to service and delivery vehicles. Permits are issued by the County to residents of the area in question, for their visitors, and for vehicles of persons doing business with those residents.

Like other jurisdictions throughout the country which have enacted similar laws,[5] the Arlington County ordinance was an attempt by the County government to address the growing troubles experienced by residential neighborhoods in particular and by the County in general as a result of commuter and transient parking. In this regard, the purposes of the Arlington County ordinance were explicitly stated by the County Board in the preamble to the ordinance itself. These are:

> "To reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the conditional uses allowed in special districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clear and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County." (Appendix D at 25a).

5. In addition to the Arlington and Montgomery County programs, counsel for amicus is aware of similar parking permit laws having been enacted or under consideration in Washington, D.C.; Charlottesville and Richmond, Virginia; Boston and Cambridge, Massachusetts; Wilmington, Delaware; Milwaukee, Wisconsin; and San Francisco, California.

Following its enactment, and after the requisite findings had been made by the County Manager, the parking permit ordinance was placed into effect on a limited basis in the Aurora Highlands area of Arlington County. This is an established residential neighborhood near U.S. Route 1, adjacent to a large complex of office and commercial buildings called Crystal City.

Shortly after it went into effect the parking permit ordinance was challenged in a suit brought by a number of commuters who worked in Crystal City and who had been using the Aurora Highlands area for all day on-street parking. Among other things, the commuters contended that the County's parking permit program denied them the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

At the trial in the Arlington County Circuit Court the County introduced evidence demonstrating the existence of the problems giving rise to the ordinance, the rational basis for the classification contained in the ordinance, and the appropriateness of the ordinance as a method of dealing with the problems experienced by residential neighborhoods as a result of commuter parking congestion. The conditions supporting enactment of the ordinance were substantiated not only by testimony from residents of the Aurora Highlands area, (Record at 340-41)[6] but also by expert testimony from transportation planners and environmental specialists. (Record at 256-293).

The County further demonstrated at the trial that the ordinance did in fact function as intended and that it achieved the beneficial results sought by its enactment. (Record at 347). It was also established at trial that the Arlington County parking permit program was part of a coordinated effort by various jurisdictions in the Washington, D.C. area to discourage commuter automobile traffic and thereby to improve the environmental quality of the region. (Record at 259-296).

While finding no fault with the objectives of the ordinance, the trial court ruled that the classification used by the ordinance

6. Record references relate to the record filed with the Supreme Court of Virginia on appeal below. Copies of this record have been docketed with this Court.

did not bear a reasonable relationship to its stated goals. (Appendix B at 21a). Without any specific findings of fact, the Court concluded that the ordinance violated the due process clauses of the state and federal constitutions and the Equal Protection Clause of the United States Constitution. (Appendix B at 22a).

Upon appeal, the Supreme Court of Virginia chose not to deal with the evidentiary record and instead treated the question presented as one of law involving the facial validity of the ordinance. The Court found that the objectives of the ordinance "constitute a legitimate governmental interest." (Appendix A at 7a). However, the Court held that the classification in the ordinance differentiating between residential parkers and non-residential parkers "bears no reasonable relation to its stated objectives." (Appendix A at 12a). The decision of the trial court was therefore affirmed.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Virginia in the instant case is contrary to past opinions of this Court defining when and under what circumstances a particular ordinance or course of action violates the Equal Protection Clause of the United States Constitution. The decision below likewise conflicts with precedent established by this Court recognizing the broad extent to which state and local jurisdictions may legislate in the interest of preserving and protecting the character and quality of residential neighborhoods. Unless the decision below is reversed by this Court, the validity of numerous residential permit programs throughout the country will be cast into doubt. Likewise, other jurisdictions which have been contemplating the adoption of such programs as a reasonable means for dealing with serious environmental, safety and planning problems will be discouraged from doing so.

1. The Decision Below Directly Conflicts With Precedent Established By This Court Setting Standards of Analysis for Evaluation of Legislation Challenged Under the Equal Protection Clause.

The Court below erred in finding the Arlington County ordinance invalid as a matter of facial impression. It is only when distinctions drawn by a statute in question are based on reasons

totally unrelated to the pursuit of a legislative goal, that they should be set aside as violative of the Equal Protection Clause of the Fourteenth Amendment. *McDonald v. Board of Election Commissioners,* 394 U.S. 802, 809 (1969). A classification, though discriminatory, is not arbitrary nor violative of equal protection if any state of facts can be reasonably conceived that would sustain it. *McGowan v. Maryland,* 366 U.S. 420, 426 (1961). If a distinction is not arbitrary and is in fact founded on a substantial difference or apparent reasons suggesting the need for differing classifications, the Court has no right to interfere with the exercise of legislative discretion. *Cf. Levy v. Louisiana,* 391 U.S. 68 (1968).

In the instant case the problems sought to be addressed were clearly stated in the preamble to the Arlington County ordinance. In addition to protecting and preserving the character and quality of the County's residential neighborhoods the ordinance sought to alleviate safety and environmental problems, all stemming from the adverse impact and congestion generated by commuter and transient parking in residential areas. It is significant to note that the Arlington County ordinance addressed a problem unique to residential neighborhoods adjacent to or nearby densely used commercial and industrial zones. The type of difficulties imposed on such neighborhoods as a result of parking by non-residents were not necessarily shared by other residential areas farther removed from the commercial or industrial zones. Accordingly, these problems and the mechanism chosen by the government to deal with them must be judged in their own special light. It would be a mistake to evaluate the needs of certain areas experiencing distinct problems and conditions in terms of what might or might not be appropriate in other non-impacted areas of the County. Whether a classification is reasonable or unreasonable depends upon the facts presented by the particular case at hand. *Seaboard Air Line R.R. v. Seegers,* 207 U.S. 73, 76-77 (1907).

The Arlington County ordinance demonstrates on its face the reasonableness of the classification in question. Once the Arlington County Board decided to act, the avenues open to the Board in striving to accomplish its stated goals were twofold. The Board could have limited all parking in particular residential

areas, or the Board could have restricted parking only on the part of those non-resident commuters and transients who have no reason to be in the residential area other than to secure a place to park. Of necessity, the Board had to deal with a classification between residential parkers, their visitors and service vehicles on the one hand and non-residential commuter parkers on the other. It was commuter parking, not the residential parking which created the conditions that the Board sought to correct.

To rule, as did the Supreme Court of Virginia, that the distinction set out in the Arlington County ordinance violates the Equal Protection Clause is to effectively deprive state and local jurisdictions of the ability to ever act to alleviate the problems addressed in that ordinance. Though acknowledging the legitimate goals of the Arlington County ordinance,[7] the decision of the Court below would leave the County with no other choice than to restrict all parking in the congested residential areas—resident parking included. To subject the residents themselves to parking restrictions, thereby denying them ready access to their dwellings, in an effort to solve a problem created by nonresidential parkers would compound the very difficulties the County Board sought to resolve. Under these circumstances the residents would have been no better off, and in reality would have been much worse off, than they previously were without any parking restrictions or prohibitions. Rather than serving as a protection, such action would in fact hasten the destruction of the residential character of the neighborhoods involved.

By choosing to restrict commuter parking, the Arlington County Board, as a matter of public policy, selected that avenue which was strictly limited to accomplish the stated goals of the ordinance and which represented the most practical course under the circumstances. This Court has held that in testing legislation against the Equal Protection guarantee the Court is not concerned with the soundness of the distinctions drawn, but rather it is sufficient that the legislature believes the distinctions drawn are valid as a basis of public policy for the people of that particular jurisdiction. *Safeway Stores, Inc. v. Oklahoma Retailer Grocers Assn.* 360 U.S. 334, 342 (1959).

7. Appendix A at 7a.

Likewise, the legislature is not compelled to attempt to deal with all possible solutions to a given problem. The fact that the Arlington County ordinance addresses the particular difficulties resulting from commuter parking in congested residential neighborhoods as opposed to parking and traffic problems in general throughout the County does not render the ordinance constitutionally suspect. It is well settled that the legislature may select one phase of a particular field of interest and apply a remedy there to the exclusion of other possibilities. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1950); *Schilb v. Kuebel*, 404 U.S. 357, 364 (1971).

If the Supreme Court of Virginia had further examined the facts and circumstances behind the Arlington County ordinance, as well as the overriding interests which the Arlington County Board was attempting to protect weighed against the interests of commuter parkers who might be somewhat disadvantaged by the ordinance, the Court should have readily perceived the reasonableness of the classification. Compare *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). Instead, without stating the reasoning therefor, the Court below characterized the Arlington County parking permit program as "invidious discrimination." (Appendix A at 12a.)

It is clear that "invidious discrimination" is indeed prohibited under the Equal Protection Clause. *Williamson v. Lee Optical Co. supra* at 489, and *Schilb v. Kuebel, supra* at 364. However, it can hardly be said that a restriction on commuter parking imposed in a manifest effort to alleviate problems created by that type of parking constitutes "invidious discrimination" as that concept has been previously dealt with by this Court.[8]

8. *See, e.g.*, Invidious discrimination found: Williams v. Rhodes, *supra* (election ballot discrimination); Levy v. Louisiana, *supra* at 68 (denial to illegitimate children of right to recover for wrongful death of mother); No invidious discrimination: Queenside Hills Realty Co. v. Saul, 328 U.S. 80 (1963) (prohibition against all persons except practicing lawyers from engaging in debt adjustment activities); Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) (right to vote for Board members of a special water district restricted to landowners as opposed to tenants in that district).

The permissible bounds which may be reached when constructing legislative classifications were recently cited by this Court in *City of New Orleans v. Dukes*, 427 U.S. 297 (1977). Therein, the Court stated:

> "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."
> *New Orleans v. Dukes, supra* at 303.

In the case of the Arlington County Ordinance, the legitimate interest of the government was readily acknowledged by the Court below;[9] the classification involved in no way approaches any of the enumerated "inherently suspect distinctions;"[10] and the rationale of the classification is apparent from the stated purposes of the ordinance.[11] Under these circumstances, and in light of *New Orleans v. Dukes, supra,* the inquiry then focuses on the matter of fundamental rights.

Parking has never been one of the fundamental personal rights recognized by this Court as being included within the protection of the Equal Protection Clause. To the contrary, the regulation of motor vehicles and the control of streets and highways is a well-recognized incident of the governmental police powers. *Sproles v. Binford*, 286 U.S. 374 (1932); *Silver v. Silver*, 280 U.S. 117 (1929). Yet the consequence of the decision by the Supreme Court of Virginia in the instant case is to place commuter parking in residential areas beyond the control of government regulation, thereby effectively creating for commuters a right to park equivalent to the well-established, traditionally-protected fundamental rights previously enunciated by this Court. *See, e.g., Harper v. Virginia State Board*, 383 U.S. 663, (1966) (Voting Rights); *NAACP v. Button*, 371 U.S. 415, (1963) (Access to Courts); *NAACP v. Alabama ex rel* Patterson, 357 U.S. 449, (1958) (Right of association); *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438, (1972) (Right of privacy).

9. Appendix A at 7a.
10. *See* New Orleans v. Dukes, *supra* at 303.
11. Appendix D at 25a.

It is simply stretching the fundamental rights issue to the breaking point to presume that a supposed right to park should stand on equal footing with the right to vote, the right to privacy, the right to association, and the right of access to the courts. Such a determination has yet to be made and there has been no valid reason advanced to suggest why it should be made at this point or in the future. If anything, given the current concentrated efforts of federal, state and local jurisdictions to discourage commuter automobile travel and to counteract the adverse effects therefrom, government regulation and control of motor vehicle parking in situations such as that presented by the instant case should be supported rather than discouraged by the courts.

The Court below further found that "[I]t appears from the face of the ordinance that the crucial basis of the classification is residence in a selected area." (Appendix A at 7a). The suggestion is that somehow a classification founded on residence might be constitutionally suspect. However, the ability of the legislature to draw a distinction based on residence without infringing on constitutionally-protected rights has been well established by this Court. *McCarthy v. Philadelphia Civil Service Comm'n.*, 424 U.S. 645 (1976) (per curiam); *City of Pittsburgh v. Alco Parking Corp., et al.*, 417 U.S. 369 (1974).

It is significant to note, in connection with the instant case, that in *Alco Parking Corp., supra,* the Court specifically recognized the right of the City of Pittsburgh to distinguish between residential and non-residential parking and to impose added burdens on the latter. In this instance a tax on off-street parking facilities was involved. The City justified treating non-residential parking differently from residential parking on the basis of non-residential parking's "relationship to traffic congestion . . . problems requiring municipal services and affect[ing] the public interest, differently from parking places accessory to the use and occupancy of residences." *Supra* at 378. The Court in *Alco* was apparently unimpressed that non-residential parking would bear burdens greater than those experienced by residential parking. The Court said: "The City was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax." *Alco, Supra* at 379.

It might well have been, as suggested by the Court below,[12] that in earlier times and under different circumstances residents of premises abutting a public street would have had no greater right to park on that street or in that area than had any other member of the general public. But times and conditions change. The problems addressed in the Arlington Court parking permit ordinance did not exist and may not have been contemplated several years ago. These problems and the manner in which they should be treated must be evaluated in present day terms. This Court, emphasizing the need for adaptability when dealing with equal protection guarantees, stated:

> "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. [Citation omitted] *Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.*" *Harper v. Virginia State Board of Elections, supra* at 669. (Emphasis added)

2. The Decision Below Violates Previous Holdings of This Court as to the Extent to Which Local Jurisdictions May Legislate in the Interest of Preserving and Protecting Residential Neighborhoods.

This Court has traditionally recognized that the preservation of the character of residential neighborhoods is an appropriate function of local government. *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926). In *Berman v. Parker*, 348 U.S. 26 (1957), the Court held that the police power of the State included the power of the legislature to determine that a community should be "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully protected." *Id.* at 33.

A recent case in point affirming the government's right to protect the interests of residential neighborhoods is *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Therein the Court

12. Appendix A, at 9-10a.

upheld action taken by a local legislature to safeguard the residential character of neighborhoods by imposing restrictions on the number of unrelated persons who could reside in a single-family home. Mr. Justice Douglas, writing for the majority, specifically recognized that the restriction of motor vehicles and the enjoyment of clean air in residential neighborhoods are legitimate goals of local government, when he stated:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra*. The police power is not confined to eliminaton of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Belle Terre, supra* at 9.

Mr. Justice Marshall, dissenting in *Belle Terre*, felt that the ordinance in question impinged upon fundamental personal rights and therefore could be sustained only upon the showing of a compelling governmental interest under the test set out in *Shapiro v. Thompson*, 394 U.S. 618 (1969). Nevertheless, Mr. Justice Marshall found ample reason to agree with the majority with respect to the government's goal of preserving the character and quality of residential neighborhoods. He stated:

> "I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined." *Belle Terre, supra* at 13 (Marshall, J. dissenting).

Young v. American Mini Theatres, Inc. 427 U.S. 50 (1976), was an even more recent case supporting the right of local government to protect the character and quality of its neighborhoods. In *Young* the Court upheld the right of the City of Detroit to exclude adult theatres from residential neighborhoods, among other places. In so doing, the Court ruled that such restriction did not violate the Equal Protection Clause or First Amendment guarantees. Mr. Justice Stevens, writing for the majority in *Young* stated:

> "It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, *the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Id.* at 71. (Emphasis added).

Considering the past decisions of this Court consistently sustaining the legitimacy of governmental goals to secure and safeguard the residential character of neighborhoods, the Arlington County ordinance should be upheld on a similar basis. If the government is considered to have a sufficiently compelling interest to control the manner of occupancy of dwellings in residential neighborhoods and to exclude certain categories of individuals from such occupancy, thereby affecting a fundamental right of association, *Belle Terre, supra,* then it likewise has a compelling interest in the regulation of parking by non-residents in congested residential neighborhoods rendered unsafe and unhealthy as a result of commuter parking. If the government, in the face of First Amendment and Equal Protection challenges, is found to have a compelling interest in restricting the locations of adult theaters, *Young, supra,* it similarly has an overriding interest in regulating commuter parking in congested residential areas.

3. The Guidance of This Court is Needed to Resolve Conflicting Judicial Opinions Throughout the Country on the Issue Presented by This Petition.

The concept behind the Arlington County parking permit

ordinance is not unique to that locality. There is nationwide interest in this subject matter and, for similar reasons, a number of other jurisdictions have adopted parking permit programs closely akin to the Arlington County law.[13] Although for the most part these differ to some degree in procedural aspects, the net result is to differentiate between residential and non-residential parking.

Given the broad scope of the ruling by the Supreme Court of Virginia in the instant case, virtually all other residential parking permit laws throughout the country would have to fall if that decision were accepted as correct. In reality, the state of the law concerning parking permit ordinances is unsettled. In addition to the decision below in the instant case and the ruling of a lower court on the ordinance of Amicus Montgomery County,[14] a number of other courts in separate areas of the country have reached differing results as to the validity of residential parking permit programs.

Most recently the Supreme Judicial Court of Massachusetts upheld, in the face of an equal protection challenge, a parking permit ordinance which restricted parking by non-residents in certain congested residential areas in the City of Cambridge. *Commonwealth v. Petralia,*_____N.E. 2d_____, No. M-729, April 29, 1977. Previously an Ohio court held a residential parking permit program to be violative of equal protection. *State v. Whisman,* 24 Ohio Misc. 59, 263 N.E. 2d 411 (1970). Last year, on similar grounds, the Superior Court for the District of Columbia preliminarily enjoined the implementation of a residential parking permit ordinance in certain congested neighborhoods in that jurisdiction. *Georgetown Association of Businessmen v. District of Columbia,* Civ. Actions Nos. 7242-76, *et al* (Aug. 9, 1976).

It is apparent from the widespread involvement of various jurisdictions with the issue of parking legislation and the disparity among lower court decisions on this subject that a definitive ruling is needed from this Court.

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13. *See* note 5, *supra.*
14. *See* note 3, *supra.*

Unless the Arlington County ordinance and similar legislation is sustained, jurisdictions will not only lack the ability to deal locally with problems affecting residential neighborhoods, but they will be unable to respond effectively to federal mandates such as those imposed by the U.S. Environmental Protection Agency which, among other things, recommend certain restrictions on commuter traffic.[15] To the extent that a parking permit ordinance would create a disincentive to commuter vehicular traffic, in favor of other alternatives, this would be consistent with the efforts of EPA and various State authorities to prescribe transportation control measures to reduce ambient concentrations of carbon monoxide as required by the Federal Clean Air Act of 1970. (42 U.S.C. §1857 *et seq.*).

It will not suffice to say that the impact of the varying lower court decisions on the matter of parking permit ordinances is localized in nature and will affect only those subdivisions within the jurisdiction of those courts. The decision of the Supreme Court of Virginia is a good case in point.

If Arlington County is judicially restricted from implementing a residential parking permit program, the County will be impeded from realizing one of the goals of its ordinance–the enhancement of environmental quality. In such case, the effect of Arlington County's inability to act will be felt by Amicus Montgomery County and other jurisdictions which along with Arlington and Montgomery Counties comprise the Metropolitan Washington Council of Governments (COG). These component jurisdictions have been working cooperatively as the National Capital Interstate Air Quality Planning Committee (AQPC) in the interest of developing air quality and transportation control plans for the region.[16] The fact that Arlington County and other Virginia jurisdictions cannot take what are believed to be necessary measures to control commuter traffic will impact on the decisions and actions of the District of Columbia and Maryland in this regard. Similar effects could well be experienced in other multi-jurisdictional areas throughout the country where varying legal interpretations of parking permit programs might come into play.

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15. *See* 38 Fed. Reg. 30626, 30629 (1973)
16. *See* 38 Fed. Reg. 16556 (1973)

CONCLUSION

The Arlington County ordinance is reasonably related to its stated purposes and well within the permissible bounds of legislative classification recognized by this Court. Accordingly, the petition of Arlington County for certiorari should be granted. Under the circumstances of this case, summary reversal of the judgment below seems appropriate.

Respectfully submitted,

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APPENDIX A

MONTGOMERY COUNTY CODE 1972, as amended, Chapter 31, titled "Motor Vehicles and Traffic"; Article IV, titled "General Parking Regulations;" Section 31-48A, titled "Parking Permit Areas".

(a) The County Council finds that the health, safety and welfare of many residents of the County are adversely affected by burdens placed on residents by virtue of major public facilities and programs created by governmental action. Frequently, the use of streets within residential areas for the parking of vehicles by persons using adjacent commercial, industrial and transit areas and other areas, facilities and programs emanating from planning, zoning and other decisions by the government results in hazardous traffic conditions, the overburdening of existing streets, roads and other facilities, air and noise pollution, and the inability of residents of certain areas to obtain adequate parking adjacent to or close by their places of residence and to secure ease of access to their places of residence. In order to reduce to the extent possible the aforementioned conditions, to foster the use of mass transit facilities and to promote the safety, peace, good order, comfort, convenience, health and welfare of the residents of the County, the Council deems it essential that the parking permit authorization provided for in this Section be enacted.

(b) The County Executive is hereby authorized to designate, by written order or regulation, roads, streets and other areas within the County in which the parking of vehicles may be restricted, in whole or in part, during certain specified times, to holders of valid parking permits issued pursuant to this section. The County Executive shall consider the institution of a parking permit system upon petition by the residents of a given area. The authority granted herein shall be in addition to, and may be exercised in conjunction with, any other authority the County Executive may have to regulate the times and conditions of motor vehicle parking.

(c) The designation of a parking permit area shall take into account, among other things:

(1) The effect on the safety of residents of the area under consideration from intensive use by non-residents for parking of vehicles.

(2) The need of the residents of the area to obtain adequate on-street parking adjacent to or close by their places of residence.

(3) The difficulty or inability of residents of the area to secure adequate on-street parking adjacent to or close by their places of residence because of widespread use of available parking spaces in that area by non-resident transient motorists.

(4) The impact of major public facilities and programs on the health, safety, and welfare of the residents of the area and any unreasonable burdens placed on those residents in securing adequate on-street parking and gaining access to their places of residence by virtue of such facilities and programs.

(5) The likelihood of alleviating, by use of a parking permit system, any problem of non-availability of residential parking spaces.

(6) The desire of the residents in the area for the institution of a parking permit system and the willingness of those residents to bear the administrative costs incidental to the issuance of permits authorized by this Section.

(7) The fact that the residents of a contemplated parking permit area have contributed to the cost of construction and/or improvement of streets and roads in such area either by the direct assessment of costs or indirectly to the extent such costs are reflected in purchase or rental prices paid by those residents.

(8) The need for some parking spaces to be available in the area under consideration for use by visitors and the general public.

(9) Such other factors as the County Executive shall deem relevant.

(d) In order to determine whether a particular area or location should be designated as a parking permit area, the County Executive or the Executive's designee shall conduct, prior to the designation of a parking permit area, or prior to the withdrawal of such designation once it is established, a public hearing at which time any interested person shall be entitled to appear

and be heard. Such hearing shall be held only after due notice has been published in a newspaper of general circulation throughout the County. The notice shall clearly state the purpose of the hearing, the exact location and boundaries of the parking permit area under consideration, and the reasons why such area is being proposed for designation or withdrawal of designation as a parking permit area and the proposed parking permit fee that would be charged. In addition to the published notice, a similar notification shall be prominently posted within the area under consideration for designation as a parking permit area.

(e) Within 45 days following the close of the public hearing, the County Executive shall decide, based on the record of that hearing, whether or not to designate the area under consideration as a parking permit area or to remove the designation in the case of an established parking permit area. The time for decision by the County Executive may be extended for an additional period of 30 days for good cause shown. The decision of the County Executive shall be publicly announced in the same manner as the announcement of the hearing.

(f) Following the designation of a parking permit area, the County Executive or the Executive's designee shall issue appropriate parking permits and shall cause parking signs to be posted in the area, indicating the times, locations and conditions under which parking shall be by permit only. Permits shall be issued only to persons residing on property immediately adjacent to a street or road within the parking permit area. A permit shall remain valid for such time as the holder thereof continues to reside in the area and during the period for which the permit is issued. Permits may be transferred only in accordance with procedures to be established in writing by the County Executive.

(g) The County Executive is authorized to establish, after due notice and opportunity for interested parties to be heard, written regulations to implement the provisions of this Section.

(h) The County Executive is authorized to establish, by written regulation, parking permit fee for permits issued pursuant to this Section in an amount sufficient to pay the costs incidental to the issuance of permits authorized by this Section.

(i) The parking of any vehicle or the use of any parking permit in a manner contrary to the provisions established by the

County Executive pursuant to this Section is prohibited and the same is hereby declared to be unlawful and a misdemeanor. Any person violating this Section shall, upon conviction thereof by a court of competent jurisdiction, be fined not more than fifty dollars for each violation and, in default of any fine so imposed, shall be imprisoned for a period not to exceed three days for each violation.

Supreme Court, U. S.
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No. 76-1418

IN THE

Supreme Court of the United States

October Term, 1976

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, *et al.*,
Petitioners,

v.

RUDOLPH A. RICHARDS, *et al.*
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI BY CERTAIN ORGANIZATIONS AND INDIVIDUALS FROM ARLINGTON COUNTY AND SURROUNDING JURISDICTIONS.

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IN THE

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October Term, 1976

No. 76-1418

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, *et al.*,
Petitioners.

v.

RUDOLPH A. RICHARDS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The organizations and individuals named in the margin ask leave to file the accompanying brief amici curiae in support of the petition for certiorari.[1] Petitioners have consented to the filing of the brief. Respondents withheld their consent.

The movants are twenty-three citizens associations and environmental groups from the District of Columbia, Arlington County, Virginia, and Montgomery County, Maryland, and eleven individuals who have been elected to serve as Advisory Neighborhood Commissioners in the District of Columbia.

[1]D.C. Federation of Civic Associations; Federation of Citizens Associations of the District of Columbia; Upper Northeast Coordinating Council; Wisconsin Avenue Cooridor Committee; Committee

(continued)

The movants from Arlington County represent Aurora Highlands, where the Arlington ordinance at issue in this case has been implemented, and another Arlington neighborhood that is eligible to become a permit parking area under that ordinance. As a result, both associations have a compelling interest in seeing that the decision of the Supreme Court of Virginia challenged by petitioners is reversed and the validity of the Arlington ordinance sustained.

The Maryland and District of Columbia movants all represent communities where permit parking programs similar to Arlington's have been enacted and implemented. Both in Maryland and the District of Columbia, litigation is underway attacking the validity of these programs, and in both jurisdictions lower courts have ruled that the programs are unconstitutional. Without a decision from this Court sustaining the validity of Arlington's ordinance, the future of permit parking in both Maryland and the District of Columbia will be in serious jeopardy. It is a measure of their commitment to defending permit parking that three of the movants have been granted leave to intervene in the District of Columbia litigation where that jurisdiction's program is now under attack. Pursuant to Rule 42 of

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of 100 on the Federal City; Metropolitan Washington Coalition for Clear Air, Inc.; Aurora Highlands Civic Association; Arlington Ridge Civic Association; Brookland Civic Association; Burleith Civic Association; Capitol Hill Restoration Society; Foggy Bottom Association; Forest Hills Citizens Association; Foxhall Community Citizens Association; Friendship Neighborhood Coalition; Gateway Community Association; Glover Park Citizens Association; Neighbors, Inc.; Sheridan-Kalorama Neighborhood Council; Stanton Park Neighborhood Association; East Bethesda Citizens Association, Inc.; Bethesda Coalition; Parking Action Group of Takoma Park; Harold Davitt; Marthlu Bledsoe; William Middleton; Charles Clinton; Carol Currie Gidley; Mary Barry; Eleanor Hansen; Evelyn Wrin; Mary Alice Branch; Anton Wood; and Raymond Gooch.

this Court's rules, leave to file the accompanying brief should be granted.

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April 1977

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1418

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, *et al.*,

Petitioners,

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On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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BRIEF OF AMICI CURIAE

STATEMENT

At issue in this case is a program adopted by Arlington County, Virginia, to combat the congestion of its residential neighborhoods with the parked cars of commuters. In Arlington, as in numerous other urban centers, large office complexes have been built next to residential communities, and the workforce at these complexes has taken advantage of the free parking available on nearby residential streets. Inevitably, the resulting influx of commuter vehicles has caused safety hazards, littering, noise, and an absence of on-street parking for residents and their guests.

Like many other jurisdictions, Arlington has responded to this threat to the quality of life in some of its residential neighborhoods by enacting an ordinance that at once seeks to lessen parking congestion and contribute to the

abatement of air pollution in the surrounding metropolitan area. The ordinance, contained in an amendment to the County's zoning regulations, empowers the County Manager to limit parking in designated neighborhoods during weekday business hours to vehicles displaying permits. Permits can be issued only to residents of the area, their visitors and persons doing business with them. (Pet. 24a-28a.)[1] These restrictions may be imposed when the county manager has determined that, on weekdays during any given month, more than 75 percent of the on-street parking spaces in the neighborhood have been occupied and at least 25 percent of the parked cars have been operated by persons bound for commercial or industrial establishments.

The preamble to the ordinance declares that it is designed to protect several aspects of the quality of life in residential areas congested by commuter parking. Among these stated purposes are:

> "to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the conditional uses allowed in Special Districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in

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[1] Page references in parentheses are to the Appendices of the Petition for a Writ of Certiorari filed by the County Board of Arlington County.

> those Districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County." (Pet. 25a.)

The first and only Arlington neighborhood where the ordinance has been implemented is Aurora Highlands. This residential community adjoins a complex of high-rise office buildings known as Crystal City where approximately 20,000 persons work. (Pet. 4a.) The portion of Aurora Highlands designated as a permit parking zone consists of three streets that contain one apartment building and several duplex and single family homes, a number of which totally lack off-street parking. (*Id.*) Soon after the ordinance became effective, this action was commenced by several commuters who work at Crystal City and have been accustomed to parking on Aurora Highlands' streets. Among their grounds for attacking the ordinance, the commuters claimed that it denied them the equal protection of the laws in violation of the Fourteenth Amendment.

At the trial conducted in the Arlington County Circuit Court, the County demonstrated the serious problems that commuter parking had created for some of Arlington's residential neighborhoods and then proceeded to show the effectiveness of the ordinance in eliminating those problems during its limited operation in Aurora Highlands. Before the ordinance was implemented, the County established, commuter parking in Aurora Highlands had been "bumper-to-bumper." (Rec. 340.)[2] The substantial traffic along neighborhood streets as commuters searched for parking spaces had increased noise levels and threatened the safety of pedestrians, including small children on their way to and from school. (Rec. 174-75, 225,

[2] "Rec." refers to Appellant's Appendix filed with the Supreme Court of Virginia on appeal below.

240, 342, 372, 435.) This influx of outsiders had the further effect of increasing littering, often on residents' lawns, and impairing the County's ability to perform routine maintenance and repair functions on neighborhood road surfaces. (Rec. 177, 180, 234, 340, 356-58, 371, 397.) Moreover, because of the intense demand for limited numbers of parking spaces, numerous parking violations had occurred. Cars frequently blocked hydrants and driveways, and prohibitions on parking at the edge of intersections were often ignored, thus jeopardizing the safety and convenience of residents. (Rec. 234, 244, 331-33, 343-44, 363, 374, 386.)

Extensive parking by commuters on Aurora Highlands' streets also had the effect of drastically reducing the parking spaces available to neighborhood residents. For residents without driveways, the County showed, this loss of on-street parking imposed especially heavy burdens. (Rec. 371, 384, 477.) But also seriously inconvenienced were the many residents whose visitors and deliverymen were forced to park several blocks away from their destinations. (Rec. 179, 233, 242-43, 333, 352, 371, 387, 397, 499, 477.) The County's expert witnesses testified that, after three or four more years, continued parking congestion could be expected to cause a serious deterioration in the quality of Aurora Highlands as a neighborhood, and property values might well decline substantially as a result. (Rec. 253-54, 425, 483, 485.)

The success of the ordinance in eliminating the problems caused by parking congestion was dramatic. Residents testified that, while the ordinance was in effect, Aurora Highlands was a different and far more pleasant place — with its streets no longer crowded by automobiles, noise and littering significantly reduced, the safety of pedestrians improved and an atmosphere of tranquility that residents had not experienced since Crystal City had been built several years before. (Rec. 347, 358, 372, 398.)

The County presented evidence at trial that, in addition to its considerable benefits to Arlington neighborhoods, its permit parking ordinance is part of a region-wide strategy for curbing automobile use by commuters and thereby improving air quality. (Rec. 259-296.) Under Section 110 of the Clean Air Act, 42 U.S.C. § 1857c-5, the states and District of Columbia are required to submit to the Environmental Protection Agency plans for meeting EPA's national ambient air quality standards. When compliance with these standards cannot be achieved merely by regulating stationary pollution sources, EPA has required states to adopt various transportation control measures, including a strategy for reducing the total vehicle miles travelled in the air quality region. 38 Fed. Reg. 30626 (1973). As part of such a strategy, EPA has recommended restrictions on commuter parking that will encourage the greater use of mass transit. *Id.* at 30629.

Acting under this regulatory scheme, in late 1973 EPA issued a unified transportation control plan for the District of Columbia and the portions of Maryland and Virginia that together constitute the National Capital Interstate Air Quality Control Region. 38 Fed. Reg. 33702 (1973). As an integral element of this plan, EPA expressly urged local jurisdictions to ban on-street parking by commuters and institute a permit system that would reserve available on-street parking for residents. *Id.* at 33707. An EPA representative, testifying at the trial below, stated that, pursuant to the provisions of the National Capital Region plan, Arlington's permit parking ordinance had been reviewed and then endorsed in writing by EPA. (Rec. 270-271; Pet. 28a-29a.)

Despite its recognition that it "had the benefit of the testimony of transportation experts, planners, ecologists, and a representative of the Environmental Protection Agency" (Pet. 21a), the trial court made no findings of fact regarding the conditions motivating the enactment of the Arlington

ordinance or its effects on Aurora Highlands. While agreeing that the objectives of Arlington's permit parking ordinance were "laud[able]," the court concluded broadly that the classification made by the ordinance — which it described as constituting "those who reside in the permit area, and those who do not" — did not bear any reasonable relationship to the ordinance's stated objectives. (Pet. 21a.) On this basis, the court found violations of the due process clauses of the Virginia and Federal Constitution, as well as of the equal protection clause of the Federal Constitution. (Pet. 22a.) The court enjoined the County from enforcing the ordinance in Aurora Highlands. (*Id.*)

On appeal, the Supreme Court of Virginia also chose not to discuss the factual record developed by the County. Expressly finding it unnecessary to address arguments based on the provisions of the Virginia Constitution, the Supreme Court concluded that "the ordinance on its face offends the Equal Protection Guarantee of the Fourteenth Amendment." (Pet. 12a.) The court recognized that "[l]ocal governments have a legitimate interest in regulating the cause of the manifold problems which result from parking congestion." (Pet. 11a-12a.) However, asserting that "the cause of such problems is the use of public streets by motorists in general, wherever they live or work," (Pet. 12a), the court determined that "the classification created by this ordinance bears no reasonable relation to its stated objectives". (p. 12a.) On this ground, it affirmed the decision of the trial court.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Virginia is in direct conflict with countless decisions of this Court sustaining, against equal protection challenge, economic and social legislation enacted by state and local governments whenever that legislation has any rational basis. The

problem of parking congestion addressed by the Arlington ordinance exists in numerous metropolitan areas throughout the United States. The solution embodied by the ordinance has been adopted or is under consideration by several other local governments and represents an important element of the federal government's strategy for combatting air pollution. If allowed to stand, the decision of the Supreme Court of Virginia, along with similar decisions by other lower courts, will inhibit the enactment and implementation of permit parking programs like Arlington's. A decision by this Court reversing the Supreme Court of Virginia is essential to insure that this important tool of transportation control and neighborhood preservation remains available to local communities without any fear that it may be forbidden by the United States Constitution.

1. Many times and over many years, this Court has emphasized that the judgments of legislative bodies, exercising their police powers to promote the welfare of their communities, are entitled to the greatest deference and must be sustained against equal protection challenge unless the classification in question is wholly irrational. As stated in *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classfiication rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The Court has applied this principle in a long line of cases upholding the widest variety of local legislation, including statutes touching upon such diverse subjects as local business practices, professional qualifications, education, housing conditions and transportation control.[3] Just last term, in fact, in the course of sustaining a New Orleans ordinance that granted two long-time pushcart operators a monopoly on the pushcart business in the French Quarter, the Court reiterated that it "consistently defers to legislative determinations as to the desirability of particular statutory discriminations . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Ever since *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926), which upheld a zoning ordinance preventing the erection of apartment buildings and factories in certain residential areas, the Court has consistently accepted as a rational basis for challenged legislation the justification present in this case — protecting the living environment of

[3] McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976); Sosna v. Iowa, 419 U.S. 393 (1975); San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); McGinnis v. Royster, 410 U.S. 263 (1973); Schilb v. Kuebel, 404 U.S. 357 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); McDonald v. Board of Elections, 394 U.S. 802 (1969); Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express v. New York, 336 U.S. 106 (1949); A.F. of L. v. American Sash Co., 335 U.S. 538 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm'rs., 330 U.S. 446 (1947); Tigner v. Texas, 310 U.S. 141 (1940); South Carolina Hwy. Dept. v. Barnwell Bros., 303 U.S. 177 (1938); Semler v. Dental Examiners, 294 U.S. 608 (1935); Metropolitan Co. v. Brownell, 294 U.S. 589 (1935); Borden's Co. v. Baldwin, 293 U.S. 194 (1934); Sproles v. Binford, 286 U.S. 374 (1932); Silver v. Silver, 280 U.S. 117 (1929); Bryant v. Zimmerman, 78 U.S. 63 (1928); Rast v. Van Deman & Lewis, 240 U.S. 342 (1916); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

local communities against forces that threaten the stability, safety and tranquility of residential life. For instance, in *Berman v. Parker*, 348 U.S. 26 (1954), the Court affirmed the power of the District of Columbia government to raze slum dwellings and replace them by more profitable, privately-owned commercial structures. The Court singled out for special endorsement the goal of an improved living environment for District citizens:

> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them." *Id.* at 33.

More recently, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court rejected an equal protection challenge to a zoning ordinance that prohibited more than two unrelated persons from living together in a single dwelling unit. The Court emphasized that it was presented "with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective.' " *Id.* at 8. The Court then stressed the importance of protecting residential areas from vehicular congestion, noise and polluted air — the very conditions that the Arlington ordinance seeks to eliminate:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9.

Only last term, in a case where the goal of neighborhood preservation was in conflict with an even more fundamental right than the right of association claimed in *Belle Terre*, the Court sustained against equal protection attack a zoning regulation that excluded from a Detroit neighborhood so-called adult motion picture theaters while permitting theaters showing less objectionable films. *Young v. American Mini Theaters*, 427 U.S. 50 (1976). To justify this asserted infringement on the film distributor's freedom of expression, the prevailing opinion relied on "the city's interest in the present and future character of its neighborhoods." *Id.* at 72.

If anything, the principles affirmed by these cases apply even more forcefully to legislation that controls the parking practices of non-resident commuters. Access to parking — especially free parking near one's place of employment — can hardly be equated with those "fundamental rights," like exercising the franchise, that this Court has held can be restricted only when necessary "to promote a compelling governmental interest."[4] Numerous decisions of the lower federal courts and state courts have held that there is no constitutionally protected right to drive an automobile, much less park it, in the location and manner of one's

[4] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

choice.[5] To the contrary, this Court has emphasized that "the power of the State to regulate the use of its highways is broad and pervasive," *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523 (1959), and that traffic regulation is an area "with respect to which the state has exceptional scope for the exercise of its regulatory power," *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 783 (1945). State and local governments routinely forbid trucks to use residential areas, prohibit parking on certain streets for longer than two hours or overnight, and create special parking zones for taxis, buses or emergency vehicles. When challenged in the courts, these commonplace traffic regulations have been consistently affirmed.[6]

Nor can it be seriously claimed that a classification based on residence, like one based on race or wealth, is "suspect" and therefore requires the "strict scrutiny" of a reviewing court.[7] Statutory schemes making available to residents

[5] *E.g.*, Ross v. Gunaris, 395 F. Supp. 623 (D. Mass. 1975); Wall v. King, 109 F. Supp. 198 (D. Mass. 1952); Wells v. Malloy, 402 F. Supp. 856 (D. Vt. 1975); People v. Brown, 485 P.2d 500 (Colo. 1971); State v. Rush, 324 A.2d 748 (Me. 1974).

[6] *E.g.*, City of Madison v. McManus, 171 N.W.2d 426 (Wis. 1969); City of Akron v. Davies, 170 N.E.2d 494 (Ohio 1959); Smallwood v. District of Columbia, 17 F.2d 210 (D.C. Cir. 1927); District of Columbia v. Smith, 93 F.2d 650 (D.C. Cir. 1937); Commonwealth v. Dobbins, 182 N.E.2d 123 (Mass. 1962); Commonwealth v. Sargent, 117 N.E.2d 154 (Mass. 1953); Commonwealth v. Berney, 233 N.E.2d 739 (Mass. 1968); De Pace v. Mayor and Council of Wilmington, 72 A.2d 439 (Del. 1950); State v. Perry, 130 N.W.2d 343 (Minn. 1964); City of Milwaukee v. Hoffman, 138 N.W.2d 223 (Wis. 1965).

[7] The Crystal City commuters are obviously not members of a discrete and insular minority that is entitled to special treatment under the equal protection clause. Some of them, to be sure, live outside Arlington and thus have no formal political say in Arlington affairs. Many of them, however, do live in Arlington and are no less entitled than the residents of Aurora Highlands to make their wishes known at the ballot box every year. The five members of the Arlington County

(continued)

governmental benefits denied to non-residents have repeatedly been sustained against challenge, both in the lower courts and in this Court, based on the same showing of reasonableness required for all other legislative classifications made under the police power.[8]

In this case, a rational basis for Arlington's differing treatment of residents and non-residents is plainly evident both from the stated purposes of the permit parking ordinance and the record developed at trial. Even on the theory (apparently embraced by the Supreme Court of Virginia) that the ordinance is directed solely at the general problem of parking congestion, singling out vehicles operated by non-residents for regulation is clearly reasonable. As the evidence presented by the County established, the cars of non-resident commuters are the predominant cause of parking congestion in neighborhoods such as Aurora Highlands. Surely, Arlington's County Board was entitled to limit its prohibition on parking to the class of vehicles chiefly responsible for congestion and to spare another class or parkers whose contribution to the problem was far less serious. This Court has repeatedly emphasized that

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner*

[7] (continued)
Board are elected at large and serve four-year staggered terms; at least one position falls vacant each year. As for Crystal City itself and the commercial and governmental establishments that it houses, these are not likely candidates for adversely discriminatory treatment by the County Board. The Board nurtured the Crystal City project because of its potential for invigorating the County's economy.

[8] McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (per curiam); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); Wardwell v. Bd. of Ed. of City School Dist., 529 F.2d 625 (6th Cir. 1976); McClain v. City of South Pasadena, 318 P.2d 199 (Cal. Ct. App. 1957).

> *v. Texas*, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Dental Examiners*, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

Arlington's ordinance, moreover, was not directed merely at parking congestion generally, whenever and wherever it occurred. As even a glance at its statement of objectives demonstrates, the County Board was directly and explicitly concerned with the special problems which that congestion creates when it occurs in residential neighborhoods and is caused by non-resident commuters using neighborhood streets for all-day parking. Under this Court's decisions in *Euclid*, *Berman*, *Belle Terre* and *Young*, *supra*, the County unquestionably was entitled to take measures that would maintain the quality of life in those neighborhoods, and there can be no dispute that the ordinance it enacted was rationally calculated to further that objective. It is almost self-evident that restricting parking by non-resident commuters will have the effect of decreasing littering, noise, hazards to pedestrians and parking infractions and facilitating road maintenance. To the extent that the connection between such a restriction and these benefits to the residential environment is not a matter of common sense, the County proved the point at trial by presenting abundant evidence that the permit parking ordinance had in fact accomplished its stated objectives.

Under the holding of the Court below, however, local governments like Arlington would be powerless to attack the unquestionably serious problems that commuter parking creates for residential neighborhoods without imposing a sweeping ban on on-street parking that applies to residents and commuters alike. The practical effect of any such program would be an even greater deterioration in the quality of life in these neighborhoods. Instead of competing with commuters for on-street parking, residents would now have no on-street parking at all. A program intended to benefit neighborhoods congested by commuter parking would thus have the opposite effect. Because of the program, parking in front of one's own home — which is taken for granted in ordinary residential neighborhoods — would become impossible.

The extreme approach required by the Virginia court — *i.e.*, banning parking by residents in order to attack the problems created by non-resident commuters — is not simply irrational. It ignores the fact that one of the very reasons why Arlington passed its permit parking ordinance was "to protect residents . . . from unreasonable burdens in gaining access to their residences." As the County demonstrated at trial, a serious consequence of commuter parking in Aurora Highlands was a reduction in the on-street parking available for residents and this reduction, in turn, caused substantial hardships. As the County showed, even those residents with driveways need on-street parking for deliveries and guests. (Rec. 179, 233, 242-43, 333, 352, 371, 387, 397, 449, 477.) For residents without driveways, the absence of parking in front of one's house and the time lost searching for an empty parking space represent serious inconveniences — so serious, in fact, that some Aurora Highlands residents decided to incur the expense of building driveways. (Rec. 371, 385, 477.) Thus, even if the permit parking program had no other rational objective, Arlington would clearly have been entitled to recognize the special need of its residents for on-street parking in front of their homes and to eliminate the all-day, every-day commuter parking that had made parking for residents unavailable.

Wholly apart from the goal of enhancing the quality of life in its residential neighborhoods, moreover, Arlington's differing treatment of residents and non-residents was rationally related to the objective of lessening air pollution. As indicated by the EPA representative who testified on behalf of the County, EPA's transportation control program is primarily aimed at commuters who travel long distances to and from work and make a correspondingly large contribution to the pollutants in the Washington area's air. (Rec. 282-83, 291.) Parking restrictions that encourage commuters to use alternative forms of transportation can clearly achieve a far more significant reduction in overall vehicle miles traveled than equivalent restrictions on parking by residents, who use their cars for such strictly local activities as shopping and transporting children to and from school. Unquestionably, Arlington County could rationally choose to concentrate its pollution control efforts on the class of vehicles with the greatest role in creating pollution and leave other classes of automobile users unregulated. Thus, along with its many other benefits to Arlington citizens, the permit parking ordinance served the reasonable and clearly legitimate governmental purpose of improving air quality.

2. The permit parking program at issue in this case is not unique to Arlington County. Counsel for amici know of similar programs that are either underway or under consideration in Charlottesville and Richmond, Virginia; the District of Columbia; Montgomery and Prince Georges Counties, Maryland; Wilmington, Delaware; and Baltimore, Boston, San Francisco and Atlanta.

Nor is the decision of the Supreme Court of Virginia the only instance where implementation of a permit parking program has been halted by the courts. In *State v. Whisman*, 263 N.E.2d 411 (1970), an Ohio lower court held that a permit parking program was unconstitutional because it was contrary to the equal protection clause. On

the same ground, a Superior Court judge in the District of Columbia last year issued a preliminary injunction against implementation of the program in Georgetown and three other District neighborhoods. *Georgetown Association of Businessmen v. District of Columbia*, Civ. Action Nos. 7242-76, *et al.* Three of the amici civic associations, which represent the neighborhoods in question, have intervened in the subsequent proceedings in that case. Even more recently, the permit parking program of Montgomery County, Maryland, where three of the amici associations are from, suffered a severe setback when a Maryland Circuit Court judge held the program unconstitutional. *State of Maryland v. William L. Thompson*, Criminal No. 19018. In yet another case, the validity of Cambridge, Massachusetts' permit parking program is now at issue in an appeal pending before the Supreme Judicial Court. *Commonwealth v. Allen A. Fishman, et al.*, No. 729. The lower court decision in that case sustained the program after initially holding it unconstitutional.

Considering this flurry of lower court litigation, if it grants certiorari, the Court may be assured that it is deciding a case of intense interest to several jurisdictions around the country. Moreover, as the filing of this brief underscores, the constitutional issues presented by Arlington's permit parking ordinance are extremely important to the citizens of numerous metropolitan areas that have adopted, or want to adopt, this important tool of neighborhood preservation and traffic control.

Yet another consideration makes it vitally important for the Court to hear this case. Like the Arlington ordinance, many of the permit parking programs adopted or proposed in other jurisdictions represent an effort to carry forward Federal anti-pollution policies as embodied in transportation control plans issued under the authority of the Clean Air Act. In the course of reviewing such a plan for

metropolitan Boston, the Court of Appeals for the First Circuit has sustained the validity of a ban on on-street commuter parking during morning commuter hours. *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974). Contrary to the lower court decisions discussed above, the court not only upheld this prohibition but made it clear that its approval was conditioned on the availability of an exemption from the ban for vehicles belonging to residents. *Id.* at 671-72. The principle upheld by this decision — that EPA approved anti-pollution plans may prohibit commuter parking without imposing equally drastic restrictions on residents — will be jeopardized if the decisions of the court below and other courts invalidating permit parking programs are allowed to stand. Granting the petition of Arlington County, therefore, is essential to help eliminate a potentially serious barrier to the effective implementation of federal environmental policy.

CONCLUSION

The petition for certiorari of Arlington County should be granted. Because of the sharpness of the conflict between the decision below and the decisions of this Court, summary reversal of the judgment below may be appropriate.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1418

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, *et al.*,
Petitioners,

v.

RUDOLPH A. RICHARDS, *et al.*,
Respondents.

PETITION FOR HEARING AND RECONSIDERATION OF SUMMARY DECISION

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Respondents.

PETITION FOR HEARING AND RECONSIDERATION OF SUMMARY DECISION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The County of Arlington, Virginia, *et al.*, recently petitioned The Supreme Court of the United States for a writ of certiorari seeking to have a decision of The Supreme Court of Virginia reviewed. The Virginia decision held that an Arlington County Ordinance which gave to residents abutting a public street a license to park vehicles upon the said street to the exclusion of all others was violative of the equal protection rights of the Federal Constitution upon its face. The Department of Justice

and others, who had not participated in the state court proceedings, sought to have their views and arguments, (which were against the Virginia decision), made known to the Supreme Court of the United States. They filed extensive briefs as *amici curiae* with this Court.

Petitioners, who were the successful appellees in the State court proceedings, were requested by the Supreme Court of the United States to respond to the Arlington County petition for certiorari. In response to the request, and in accordance with this Court's rules, a response *limited* to the issues of whether or not certiorari should be granted was filed by respondents with the said court. No appellate brief upon the *merits* of the issues sought to be reviewed was filed at that time by petitioners nor was any hearing of oral argument by petitioners permitted by the court.

On October 11, 1977, the Supreme Court of the United States granted a writ of certiorari to the County of Arlington, accepted the briefs of the *amici curiae* and at the same time summarily decided the issue brought to it for review. The court's order also remanded the matter to the Supreme Court of Virginia for further proceedings in conformity to the Supreme Court of the United States decision, but failed to specify what further proceedings were desired.[1]

The normal procedures established by the Rules of the Supreme Court of the United States for the filing of a legal brief by petitioners as appellees and for the presentation of oral argument were circumvented and prevented from occurring by the summary decision of the Supreme

[1] See dissents to summary reversals of state court decisions in *Von Cleef v. New Jersey*, 395 U.S. 814, 816; *Shipley v. California*, 395 U.S. 818, 820-822; *Harris v. Penn R. Co.*, 361 U.S. 15, 25-28; *Zavada v. United States*, 355 U.S. 392.

Court of the United States. Petitioners did not have their day in court. Petitioners were denied due process of law as guaranteed by the Federal Constitution.[2]

Petitioners ask that the court set aside its summary decision of October 11, 1977; that they be allowed to file to file their appellate briefs as provided by the Rules of the Supreme Court; that they be heard upon oral argument as provided by the Rules of this Court; and that thereafter the Supreme Court of the United States reconsider its decision in this matter.

Petitioners ask that the Supreme Court of the United States permit a voice to be heard upon the other side of the issue summarily decided by the court.

In the alternative, if the court is unwilling to learn the other side of the argument and to reconsider and set aside its summary decision, Petitioners ask that the

[2] See *State Court Decisions and the Supreme Court*, William J. Brennan, Jr., 31 Penn. Bar Assn. Quarterly, 303, 403 (No. 4, June, 1960); *Foreword: Process of Law*, Prof. Ernest J. Brown, 72 Harvard Law Rev. 77, 82-93 (1958).

court *amplify* and *clarify* to the Supreme Court of Virginia as to the further proceedings to be undertaken by the said State Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

This is to certify that the foregoing petition is submitted in good faith and not for delay, and is restricted to the grounds stated therein.

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